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IN THE

Supreme Court of the United States

October Term, 1949.

No. 602

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,
Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of New York in the County of Westchester and Brief in Support Thereof.

HAROLD J. SHERMAN,
Attorney for Petitioners.

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POINT I.—Subdivision (1) of Article 22 of the Warsaw Convention alleged in the third and fourth partial defenses, is void and unenforceable to limit respondent's tortious liability for damages because it contravenes the Seventh Amendment of the United States Constitution, which preserves petitioners' absolute right of trial by jury as to all issues of fact herein, including the issue of damages.. 28

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

AGAINST

PAN AMERICAN AIRWAYS, INC.,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of New York in the County of Westchester.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Mary Elizabeth Lee, Mary Elizabeth (Betty) Lee, and William Clair Lee respectfully pray that a writ of certiorari issue to review the final order of the Court of Appeals, the highest court of the State of New York, entered on the 23rd day of November, 1949, (R. 152) upon the remittitur of the Appellate Division of the Supreme Court of the State of New York in the Second Judicial Department, and the final judgment entered, (R. 1-83, 154) upon such final order and remittitur, on the 12th day of December, 1949, in the office of the Clerk of the Supreme Court of the State of New York, in the County of Westchester.

Jurisdiction.

By an order dated December 19th, 1947, Mr. Justice J. Gordon Flannery, at Special Term of the New York

Supreme Court, granted (R. 8-9) a motion for the dismissal of petitioners' claim to the extent that it substantially exceeds the sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars. Final judgment was entered (R. 6-7) upon such order in the office of the Clerk of the New York Supreme Court, County of Westchester, on the 22nd day of December, 1947.

Subsequently and on January 21st, 1948, petitioners appealed (R. 4-5) to the Appellate Division of the New York Supreme Court, Second Judicial Department, from such judgment and the orders preceding it. On May 24th, 1949, the Appellate Division unanimously affirmed (R. 81-82; 275 A. D. 855, Case No. 1) such judgment and orders. The remittitur of the Appellate Division (R. 1-83) was filed in the office of the Clerk of the New York Supreme Court in Westchester County on the 2nd day of June, 1949. And on the same day, namely, the 2nd day of June, 1949, a judgment of affirmance (R. 83-84, 140) was entered on such remittitur in the office of such Clerk of the New York Supreme Court in the County of Westchester.

In June, 1949, petitioners made a motion (R. 85-115) before such Appellate Division for an order granting them leave to appeal to the New York Court of Appeals. Such motion was denied (R. 121-122) by such Appellate Division on the 28th day of June, 1949 (275 A. D. 962, Case No. 2).

A copy of the order of such Appellate Division, denying leave to appeal to the Court of Appeals, was served on petitioners' attorneys on the 17th day of October, 1949. This was done pursuant to the terms of a certain written stipulation dated June 24th, 1947 between petitioners and respondent (R. 142-143).

Although, as is hereinafter demonstrated, the instant case involves novel legal questions never before determined by this Court or any other court, State or Federal, anywhere in the United States, petitioners and respondent, by their aforementioned stipulation (R. 142-143), agreed

to await the final outcome in the *Garcia* case* before the initiation of the further proceedings in this case. For, obviously, a reversal by this Court of the decisions of the New York Courts in the *Garcia* case, upholding the limitation of liability of common air carriers as fixed in the Warsaw Convention (49 U. S. Stats. Part II, pp. 3000, 3019), would have enured to the benefit of petitioners herein and would have rendered academic the extraordinary legal questions herein raised by them.

On October 10th, 1949, this Court finally denied (338 U. S. 824) the petition for a writ of certiorari for a review of the decisions of the New York Courts in that case.

Thereafter, and on November 2nd, 1949, petitioners applied to the Court of Appeals for leave to appeal to that Court (R. 123-145). On November 23rd, 1949, the Court of Appeals denied leave to appeal to petitioners R. 152; 300 N. Y. (Dec. 31, 1949 Wkly Adv. Shts.) p. i foll. p. 545).

With the entry of the final order of the Court of Appeals (R. 152) on November 23rd, 1949 and the entry of the final judgment (R. 154) upon such final order of the Court of Appeals, and upon the aforementioned remittitur, on the 12th day of December, 1949, in the office of the Clerk of the New York Supreme Court in Westchester County, this litigation finally terminated in the Courts of New York.

The filing of the instant petition and supporting brief, together with a certified transcript of the record of all the proceedings herein, in this Court, is within the ninety day period specified in Section 2101 of Title 28 of the United States Code.

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*183 Misc. 258, affid. in 269 App. Div. 289 (Sec. Dept.), affd. without opinion in 295 N. Y. 852, cert. den. for want of final judgment in 329 U. S. 741; and related case in 274 A. D. 996 (Sec. Dept.), leave to appeal denied by Court of Appeals on April 14th, 1949, unreported officially, cert. den. finally in 338 U. S. 824.

The jurisdiction of this Court is invoked under Article 3, Section 2 of the United States Constitution and Section 1257 of Title 28 of the United States Code.

Convention and Constitution Involved.

This case involves the "Convention for the Unification of Certain Rules Relating to International Transportation by Air, Warsaw, 1929" (49 U. S. Stats., Part II, pp. 3000, 3019) also known as the "Warsaw Convention". However, petitioners have not at any time attacked, nor do they now seek to attack, the constitutionality and validity of the *entire* Warsaw Convention. Their objective was, and still is, limited to challenging and testing the alleged constitutionality and validity, of only *a part* of the Warsaw Convention, to wit: Subdivision (1) of Article 22 thereof, upon certain *new grounds*. Its provisions are as follows (49 U. S. Stats., Part II, pp. 3000, 3019):

> "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

Apart from petitioners' first major contention of the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention, and solely with reference to their second major contention of the invalidity, as a matter of correct legal construction, of the above quoted *portion* of the Warsaw Convention, there are two other closely allied segments of the Warsaw Convention to be considered by this Court. These are Article 17 and Subdivision (1) of Article 20 (49 U. S. Stats., Part II, 3013, 3018-3019). Their provisions are:

"Article 17

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

"Article 20

"(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Petitioners' first major contention is predicated directly on the Seventh Amendment of the United States Constitution. Its pertinent provisos are as follows (U. S. C. A. Const. Amends., p. 379):

"Amendment VII—Civil Trials

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, * * *."

Questions Presented.

The principal question under the Seventh Amendment is as follows:

1. Does the provision of Subdivision (1) of Article 22 of the Warsaw Convention (49 U. S. Stats., Part II, 3000, 3019) for the limitation of the tortious liability of air carriers to the sum of 125,000 francs or the equivalent of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars, as applied by the Special Term and the Appellate Division of the New York Supreme Court, to the undisputed facts of peti-

tioners' claim for damages substantially in excess of such limited sum, deprive petitioners of any property and civil rights in violation of the Seventh Amendment of the Constitution?

Several subsidiary questions relative to the application of the Seventh Amendment in the case at bar, are as follows:

2. Is the instant action at law of petitioners to recover damages in full from respondent, Pan American Airways, Inc., by reason of the wrongful death of decedent within the territorial jurisdiction of Portugal a "suit at common law" within the meaning of the Seventh Amendment of the Constitution?

3. Can the constitutionality of Subdivision (1) of Article 22 of the Warsaw Convention under the Seventh Amendment of the Constitution be tested legally in the instant State Court action at law for damages for the wrongful death of the decedent?

4. If Subdivision (1) of Article 22 of the Warsaw Convention is unconstitutional as violating the Seventh Amendment of the United States Constitution, does its unconstitutionality *per se* operate to render void and unenforceable the limitation of respondent's tortious liability as expressly incorporated by reference to the Warsaw Convention in the transportation contract at bar between petitioners' decedent and respondent?

5. If Subdivision (1) of Article 22 of the Warsaw Convention is unconstitutional as violating the Seventh Amendment of the Constitution, and if its unconstitutionality *does not per se* render void and unenforceable the limitation of respondent's tortious liability as expressly incorporated by reference to the Warsaw Convention in the transportation contract at bar between petitioners' decedent and respondent, does such contractual limitation of the tortious liability of respondent validly operate to limit the damages re-

coverable by petitioners to the amount awarded in the judgment, notwithstanding that admittedly (R. 48-49) respondent failed to offer decedent a choice between a lower fare and the maximum fare and a corresponding election between the lower liability and the maximum liability, or any special contract for higher liability? (see pp. 22-23, 38, *infra*).

6. Upon the record herein undisputedly demonstrating (R. 48-49) that respondent, Pan American Airways, Inc., failed to offer to petitioners' decedent a choice between a lower and a higher fare and between a correspondingly reduced and maximum tortious liability, or any *real consideration* for limited tortious liability or any special contract for higher tortious liability, did petitioners' decedent in entering into the transportation contract at bar with respondent, pursuant to the Warsaw Convention, and in purchasing international transportation thereunder on respondent's airplane, for the maximum chargeable fare, waive any rights which he may have had under the Seventh Amendment, to enforce respondent's tortious liability in excess of the amount prescribed in the Warsaw Convention?

7. Upon the record herein, if the answer to preceding question number 6 is in the affirmative, does such waiver by decedent operate to conclude any rights which petitioners may have, individually, under the Seventh Amendment to enforce respondent's tortious liability for damages in excess of the amount prescribed in the Warsaw Convention?

Another question of major importance, but wholly independent of the crucial legal effect of the Seventh Amendment on Subdivision (1) of Article 22 of the Warsaw Convention, is as follows:

8. Are the provisions of Subdivision (1) of Article 22 of the Warsaw Convention and its allied Articles 17 and 20, and as incorporated in such transportation

contract, fatally general, vaguely broad, ambiguous and uncertain as to the causes and the kinds of liability of respondent and as to the persons affected thereby and, upon such grounds, void and unenforceable to limit respondent's tortious liability to petitioners for damages for the wrongful death of decedent?

STATEMENT OF MATTER INVOLVED.

The Action.

Petitioners instituted this action in the New York Supreme Court in the County of Westchester on or about the 30th day of November, 1943, by the service of process and a verified complaint upon the respondent (R. 50-59). In essence, the action is one strictly *ex delicto* for the recovery of damages substantially exceeding the sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars, as awarded to petitioners in the judgment (R. 6-7) herein, from respondent for the wrongful death of petitioners' decedent, Arthur Albertus Lee, within the territorial jurisdiction of the Republic of Portugal.

It is predicated and proceeds upon the established principles of Common Law Private International Jurisprudence or Conflicts of Law.

[N. B. Such principles of private international law are enunciated in 16 Am. Jur. 253, §389; id. 255, §390; Restatement of the Law of Conflicts of Law, Am. Law Institute, pp. 479-480, §391; id. pp. 493-494, §412; Professor Beale's Conflicts of Law (1935 Ed.) Vol. 1, p. 52, §5.2; Professor Dicey's Conflicts of Law (5th Ed. 1932) p. 77; *Slater* v. *Mexican National RR. Co.*, 194 U. S. 120, 126, opinion by Holmes, *J.*; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 106-113, Opinion by Cardozo, *J.*]

The Parties.

Petitioners, Mary Elizabeth Lee, Mary Elizabeth (Betty) Lee, and William Clair Lee, are respectively the surviv-

ing widow, daughter, and son of the late Arthur Albertus Lee, the unfortunate victim of an airplane disaster hereinafter adverted to. They are citizens of the State of New York and residents in Westchester County thereof. Prior to and at the time of his sudden and untimely decease, the late Arthur Albertus Lee was likewise a citizen of the State of New York and a resident in Westchester County. He was a man of substantial means, unique capabilities, and high standing as a successful business executive in the motion picture industry in the United States and abroad (R. 20, 25, 58).

Respondent, Pan American Airways, Inc., is a New York corporation engaged in the business of a common carrier of passengers for hire by means of aircraft or flying boats from various places in the United States to various countries of the world. It owned, maintained, operated and controlled the "Yankee Clipper", the airplane or flying boat described in the complaint (R. 25, 51).

The Facts of Petitioners' Cause of Action as Conceded By Respondent.

On or about the 22nd day of February, 1943, Arthur Albertus Lee was riding as a regular fare-paying passenger on board respondent's airplane or flying boat "Yankee Clipper", which was then flying across the Atlantic Ocean from LaGuardia Airport, in New York, New York, to an airport in Lisbon, Republic of Portugal. While it was thus proceeding in flight, such flying vehicle crashed with great force and violence into the Tagus River, in the landing area of the airport at and within the territorial limits of Lisbon, Portugal. As a result of such accident, Arthur Albertus Lee was killed (R. 26, 52, 60).

This terrible disaster was due to the *negligence* of respondent and its agents in the maintenance and management and operation of the "Yankee Clipper" (R. 21, 26-27, 56-58).

By the laws of the Republic of Portugal at the time and the place of such accident, liability was created and

imposed upon respondent for its wrongful and negligent conduct in connection with the untimely and tragic death of the late Arthur Albertus Lee. And by such foreign laws at the *locus in quo*—Portugal not being a signatory or adhering party to the Warsaw Convention—the rights to claim and sue for, as well as receive, all monetary damages—*with no limitation thereon*—sustained by petitioners as surviving widow and next of kin of such decedent in the premises, became vested directly in them in their respective individual capacities for their entire personal benefit, to the exclusion of the estate and creditors of such decedent (R. 21-22, 26-27, 52-56). Such damages of petitioners are substantially in excess of the sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars (R. 6-7), the amount awarded to them in the judgment herein, as prescribed in the Warsaw Convention.

Other significant facts are these: Respondent never offered decedent, in any manner or form whatsoever, a choice between a lower and a higher rate of fare and a corresponding election between a lower limit of liability and maximum liability for accidental hazards to his person in connection with his transportation on respondent's airplane or flying boat "Yankee Clipper". Nor, for that matter, did respondent offer decedent any *special contract* for *any higher* liability whatsoever. Respondent charged decedent and decedent paid to respondent only the regular and uniformly fixed fare chargeable for his aforementioned transportation aboard such "Yankee Clipper" (R. 48-49).

All the foregoing facts are admitted by respondent (R. 20-23, 27-28, 48-49, 51-59, 60).

The Manner in Which the Federal Questions at Bar Were Raised and Decided.

In its answer, however, respondent directly invoked and set up, as its alleged third partial affirmative defense, the very substantial—though not total—immunity from *tortious* liability as provided in the Warsaw Con-

vention of October 29th, 1929 (49 U. S. Stats. Part II, 3000, 3019) originally between only twelve foreign countries of the world, and to which the United States "adhered" in 1934. It substantially pleaded (a) that decedent's transportation in the course of which he met his death, was made by respondent under a contract between decedent and respondent, (b) that such transportation was international within the purview of and subject to such Warsaw Convention, (c) that the rights of the parties are controlled by the provisions of such Warsaw Convention, and (d) that by the operation and legal effect of such Warsaw Convention *per se,* the liability of respondent to petitioners is limited to the sum of 125,000 French gold francs, or the equivalent of only the sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars (R. 61-62, 67-68).

In its answer, respondent also pleaded, as the basis of its alleged fourth partial affirmative defense, that a certain contract was made between decedent and respondent in New York (R. 65-66), (a) that decedent's transportation in the course of which he met his death, was effected by respondent under such contract, and a certain flight coupon issued thereunder, (b) that by the terms of such contract and flight coupon such transportation was international within the purview of and subject to such Warsaw Convention as incorporated and made a part of such contract, (c) that by the operation and legal effect of the terms of such contract *per se* the rights of the parties are controlled by the provisions of such Warsaw Convention and accordingly that respondent's liability to petitioners is limited to the sum of 125,000 French gold francs or the equivalent of only the sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars (R. 62-68).

On or about March 10th, 1947, petitioners instituted a motion, pursuant to Rule 109 of the Rules of Civil Practice of New York, at Special Term, in the New York Supreme Court, for an order striking out the aforementioned

third and fourth partial affirmative defenses alleged in respondent's answer, as insufficient in law. The grounds for such motion, as particularly expressed in petitioners' formal notice thereof (R. 45-46) were:

> "I.—Subdivision (1) of Article 22 of the Warsaw Convention alleged in the Third and Fourth Partial Defenses is void and unenforceable to limit defendant's tortious liability for damages because it contravenes the Seventh Amendment of the United States Constitution, which preserves plaintiffs' absolute rights of trial by jury as to all issues of fact herein, including the issue of damages;
>
> "II.—The transportation contract made between decedent, Arthur Albertus Lee, and defendant, pursuant to such Warsaw Convention, as alleged in such Fourth Partial Affirmative Defense, being infected at its core with the unconstitutionality of Subdivision (1) of Article 22 of such Warsaw Convention, is likewise void and unenforceable to limit defendant's tortious liability for damages;
>
> "III.—The provisions of Subdivision (1) of Article 22 of such Warsaw Convention, and its allied Articles 17 and 20, are fatally general, vaguely broad, ambiguous and uncertain as to the causes and the kinds of liability of defendant and as to the persons affected thereby. Subdivision (1) of Article 22 and the transportation contract relating thereto, as alleged in such Third and Fourth Partial Affirmative Defenses, are, therefore, void and unenforceable to limit defendant's tortious liability for damages;"

Obviously, then, it is by that initial motion that petitioners directly and expressly raised the distinctly new constitutional and various other new Federal questions at bar in respect to the aforementioned alleged defenses as based upon such Warsaw Convention.

The Decisions of Mr. Justice J. Gordon Flannery at Special Term of the New York Supreme Court.

Such motion was heard by Mr. Justice J. Gordon Flannery at Special Term in the New York Supreme Court on May 28th, 1947. Shortly thereafter, on June 3rd, 1947, Mr. Justice J. Gordon Flannery rendered a decision without opinion, denying it (R. 70). The jurist merely cited "*Garcia* v. *Pan American Airways,* 269 App. Div., 287, 292, aff'd 295 N. Y. 852" (R. 70). And this, notwithstanding that respondent's counsel, Mr. Donald Havens, had made the following concessions in open Court (R. 31-32):

> "In all fairness to Mr. Sherman, I want to say that he on behalf of plaintiffs, is urging brand new arguments which were not involved in the *Garcia* case. One can only speculate whether the Court of Appeals, if it had my opponent's new arguments before it, would have decided the *Garcia* case otherwise than it did. The point is, the Court of Appeals upheld the constitutionality and validity of the Warsaw Convention."

Subsequently, in September, 1947, respondent moved at Special Term of the New York Supreme Court, pursuant to Rules 112 and 113 of the Rules of Civil Practice of New York and Section 476 of the Civil Practice Act of New York, for an order dismissing petitioners' claim to the extent it exceeds the sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars, and otherwise granting judgment in favor of petitioners for no more than such amount (R. 2, 10-23). That motion, too, came on before Mr. Justice J. Gordon Flannery, at Special Term, in the New York Supreme Court on November 24th, 1947 (R. 2, 6). Two days later, on November 26th, 1947, Mr. Justice J. Gordon Flannery granted it, without opinion (R. 2, 42), presumably upon the theory

that the disposition of petitioners' prior motion constituted "the law of the case".

Thereafter, and in due course, petitioners appealed to the Appellate Division of the New York Supreme Court (R. 4-5). Upon the oral argument of the appeal, respondent's counsel, Mr. Donald Havens, in response to pointed questions from Mr. Presiding Justice Gerald Nolan, again candidly admitted that "the legal questions raised by plaintiffs are novel, having never before been presented to any other court in the State of New York or any other state of the United States" (R. 136).

The Decisions of the Appellate Division.

On May 24th, 1949, the Appellate Division unanimously affirmed, without opinion and without citation of authority, the original orders and judgment herein (R. 81-82, 275 A. D. 855, Case No. 1). And on the 27th day of June, 1949, the Appellate Division also denied, without opinion, petitioners' application for leave to appeal to the Court of Appeals (R. 121-122; 275 A. D. 962, Case No. 2).

The Decision of the New York Court of Appeals.

Precisely on the sixteenth day following the service by respondent of a copy of the order, with notice of entry thereon, denying petitioners' application for leave to appeal to the Court of Appeals, petitioners moved directly in the Court of Appeals (R. 123-145) for leave to appeal to that Court from the aforementioned orders and judgment of affirmance. Such motion was denied without opinion on November 23rd, 1949 (R. 152; 300 N. Y. (Dec. 31, 1949 Wkly Adv. Shts.) p. i, foll. p. 545).

Basis of the Decisions in the State Courts.

Unfortunately, because no opinion was written by any of the Courts of the State of New York in support of their decisions, the precise grounds thereof are unknown.

Inasmuch as Mr. Justice J. Gordon Flannery merely cited in support of his decision (R. 70) the *Garcia* case, his decision may possibly be explained as indicating an attitude that the *Garcia* case should, as intimated in the oral argument before him by respondent's counsel, be deemed to "control" tentatively the case at bar at least until the Court of Appeals has had the opportunity of considering and authoritatively deciding the novel, momentous, and complex federal legal questions as raised by petitioners.

Since the decision of the Appellate Division (275 App. Div. 855, Case No. 1) was not accompanied with any citation of authority in its support, it is, of course, difficult to explicate precisely such decision. It is not inconceivable, however, that the Appellate Division, too, in accordance with the suggestion of respondent's counsel (R. 136), concluded that because of the extraordinary character, profundity, and importance of such federal legal questions, the case at bar should be regarded as tentatively "controlled" by the *Garcia* case until a review and authoritative determination by the Court of Appeals of such federal legal questions.

The decision (R. 152) of the Court of Appeals denying leave to petitioners to appeal to that Court is, likewise, a matter of speculation as to its precise underlying reasons. The Court of Appeals, likewise, may have thought that, in view of its own decision (295 N. Y. 852) in the *Garcia* case upholding as valid the limitation of the tortious liability of air carriers as prescribed in the Warsaw Convention, the *Garcia* case should govern the case at bar until this Court, as ultimate guardian of the rights of all persons under the Constitution, treaties, and other laws of the United States, should determine to review and decide the concededly novel federal questions at bar.

Irrespective of the unknown particular reasons which may have been assigned for the decisions of the State Courts, there is *no uncertainty* whatever as to the basic legal effect of such decisions for the purpose of affording

jurisdiction to this Court to grant a writ of certiorari herein.

Clearly, the record at bar is consistent exclusively with implications necessarily arising therefrom that the Special Term and the Appellate Division of the New York Supreme Court could not have made their decisions, orders, and judgment herein——

> (a) without deciding adversely to petitioners one or more of the first seven federal questions (*vide* pp. 5-7, *supra*) embracing the application and legal effect of the Seventh Amendment of the United States Constitution on the purported limitation of liability of air carriers in Subdivision (1) of Article 22 of the Warsaw Convention (49 U. S. Stats., Part II, 3000, 3019), and
>
> (b) without also deciding adversely to petitioners the entirely independent eighth federal question (*vide,* pp. 7-8, *supra*) which challenges the validity of that very same *portion* of the Warsaw Convention as a matter of correct legal construction.

Plainly, no other defenses or matters pleaded in respondent's answer (R. 60-69) entered into such decisions of the Special Term and the Appellate Division. And no presumption whatever can arise in this Court that the Special Term and the Appellate Division rendered their decisions on "some other ground not found in the record or suggested in that Court". (*Keith* v. *Clark,* 7 Otto [97 U. S.] 454; *Cf. Maguire* v. *Tyler,* 8 Wall. [75 U. S.] 650, 664-665.)

In *Schlemmer* v. *Buffalo R. & P. R. Co.,* 205 U. S. 1, 11, this Court, by Holmes, *J.*, stated:

> "We certainly do not mean to qualify or limit the rule that, for this Court to entertain jurisdiction of a writ of error to a state court, it must appear affirmatively that the state court could not have reached

its judgment without *tacitly*, if not expressly, deciding the federal matter. *Bachtel* v. *Wilson*, Jan. 7, 1907, 204 U. S. 36. But on the other hand, if the question is duly raised and the judgment necessarily, or by what appears in fact involves such a decision, then this Court will take jurisdiction, although the opinion below says nothing about it. *Kaukaunana Water Power Co.* v. *Green Bay & Miss. Canal Co.*, 142 U. S. 254." (Emphasis supplied.)

Accord: *Bell's Gap Railroad Co.* v. *Commonwealth of Pennsylvania*, 134 U. S. 232, 234; *Seaboard Airline Railway* v. *Duvall*, 225 U. S. 477, 487-488.

And in *Chapman* v. *Crane*, 123 U. S. 540, 548, this Court pronounced the following:

> "We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by *evading* a direct decision thereon as by positive action. If a federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejects the claim but avoids all reference to it, is as much against the right within the meaning of Section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused." (Emphasis supplied.)

To the same effect: *Des Moines Navigation & R. R. Co.* v. *Iowa, etc.*, 123 U. S. 552, 555.

So far as concerns the decision herein (R. 152) of the Court of Appeals, it is established under the local New York law that a "denial of a motion for leave to appeal is not equivalent to an affirmance" of the order and judgment sought to be reviewed. (*Matter of Marchant* v. *Mead-Morrison M. Co.*, 252 N. Y. 284, 297-298 [Cardozo, *Ch. J.*] rearg. den. in 253 N. Y. 534, appeal dismissed in 282 U. S. 808; 6 Carmody's New York Practice [2nd Ed.] §626, p. 555.) Nonetheless, it suffices that for the purpose of giv-

ing this Court jurisdiction to issue a writ of certiorari herein, the decision of the Court of Appeals represents a declination of that Court as the highest Court of the State of New York to entertain a review of the federal matters in this case and is indicative of the fact that petitioners have exhausted their remedies of appeal in the State Courts (*American Railway Express Co.* v. *Levee,* 263 U. S. 19, 20-21 [Holmes, *J.*].)

Specification of Errors.

The Special Term and the Appellate Division of the New York Supreme Court erred as follows:

1. In refusing to hold that Subdivision (1) of Article 22 of the Warsaw Convention arbitrarily, in contravention of the Seventh Amendment of the United States Constitution, deprives petitioners of their civil rights and property in their claim for damages substantially in excess of the sum of 125,000 francs or the equivalent of $8,291.87, as prescribed in such provision of the Warsaw Convention;

2. In refusing to hold that petitioners' instant action at law to recover damages in full from respondent, Pan American Airways, Inc., by reason of the wrongful death of decedent within the territorial jurisdiction of Portugal, is a "suit at common law" within the meaning of the Seventh Amendment of the United States Constitution;

3. In refusing to hold that the constitutionality of Subdivision (1) of Article 22 of the Warsaw Convention, under the Seventh Amendment of the United States Constitution, can be tested legally in the instant State Court action at law for damages for the wrongful death of decedent;

4. In refusing to hold that petitioners' decedent, in entering into the transportation contract at bar with respondent, pursuant to the Warsaw Conven-

tion, and in purchasing international transportation thereunder on respondent's airplane, did not waive any rights which he may have had under the Seventh Amendment to enforce respondent's tortious liability in excess of the amount prescribed in the Warsaw Convention, upon the undisputed facts (R. 48-49) showing that respondent, Pan American Airways, Inc., failed to offer decedent a choice between a lower and a higher fare and between a correspondingly reduced and maximum tortious liability, or any real consideration for tortious liability or any special contract for higher liability;

5. In refusing to hold that no such waiver by decedent of his aforementioned rights under the Seventh Amendment operates to conclude any rights which petitioners may have individually under the Seventh Amendment to enforce respondent's tortious liability for damages in excess of the amount prescribed in the Warsaw Convention, assuming *arguendo,* but without conceding, such waiver on the decedent's part exists;

6. In refusing to hold that the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention, *per se,* operates to render void and unenforceable the limitation of respondent's tortious liability as incorporated by reference to the Warsaw Convention in the transportation contract at bar between decedent and respondent;

7. If the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention *does not, per se,* render void and unenforceable the limitation of respondent's tortious liability as incorporated in the transportation contract at bar by reference to the Warsaw Convention—then in refusing to hold that such contractual limitation of such tortious liability of respondent does not validly operate to limit the damages recoverable by petitioners to the

amount awarded in the judgment, upon the undisputed facts (R. 48-49) demonstrating that respondent failed to offer decedent a choice between a lower fare and a maximum fare and a corresponding election between the lower tortious liability and maximum tortious liability, or any special contract for higher tortious liability (see pp. 22-23, 38, *infra*);

8. In refusing to hold that the provisions of Subdivision (1) of Article 22 of such Warsaw Convention and its allied Articles 17 and 20, and as incorporated in such transportation contract, are fatally general, vaguely broad, ambiguous and uncertain as to the causes and the kinds of liability of respondent and as to the persons affected thereby, and upon such grounds void and unenforceable to limit respondent's tortious liability to petitioners for damages for the wrongful death of decedent;

9. In denying petitioners' motion to strike out as insufficient in law the alleged third and fourth partial affirmative defenses of respondent, upon the particular federal grounds specified herein by petitioners;

10. In granting respondent's motion for judgment on the pleadings or, in the alternative, for summary judgment for the dismissal of petitioners' claim for damages substantially in excess of the sum of $8,291.87, as prescribed in Subdivision (1) of Article 22 of the Warsaw Convention.

Reasons for Granting the Writ.

1. The Special Term and the Appellate Division of the New York Supreme Court have decided federal questions of substance (*vide*, pp. 5-8, *supra*) not previously determined by this Court. Indeed, up to this moment, no other Court, State or Federal, has at any time ever considered and determined such particular federal questions. The novelty of the federal questions as raised

by petitioners was conceded by respondent's counsel in open court at Special Term and in the Appellate Division (R. 31-32, 136; *vide* pp. 5-8, 12, *supra*). Their substantial character cannot be gainsaid because, to say the very least, they are obviously debatable, requiring "analysis and exposition for ... decision". (*Millheim* v. *Moffat, etc.*, 262 U. S. 710, 716-717; *Senn* v. *Tile, etc.*, 301 U. S. 468, 476-477; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 91; *Chesebrough* v. *Los Angeles, etc.*, 306 U. S. 459, 463; Ohlinger's Federal Practice, Vol. I [Rev. Ed. 1949], p. 508 [28:1257 (4)].)

The particular constitutional and other federal questions presented in the *Garcia* case are indisputably different from those in the case at bar. The legal distinctions between the two cases as well as those between the case at bar and the three other Warsaw Convention cases* cited by respondent, are clearly demonstrated in petitioners' accompanying brief (pp. 56-59, *infra*).

Respondent's argument, as repeatedly urged in the Courts below (R. 17, 31-32, 118, 136, 148) that the *Garcia* case is the governing law of the case at bar, is specious and the Appellate Division's affirmance of the Special Term's decision as expressly based (R. 70) on the *Garcia* case, is indubitably fallacious.

2. The Special Term and the Appellate Division of the New York Supreme Court have decided federal questions of substance not in conformity with principles of constitutional law under the Seventh Amendment, as pronounced by this Court and various other authorities.

Petitioners contend that Subdivision (1) of Article 22 of the Warsaw Convention (49 U. S. Stats., Part II, 3000, 3019) and the decisions and judgments of the Special

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**Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963, affd. without opinion in 267 App. Div. 947 (First Dept.), affd. without opinion in 293 N. Y. 878, cert. den. 324 U. S. 882; *Ross* v. *Pan American Airways, Inc.*, 299 N. Y. 88; and *Indemnity Insurance Co. of North America* v. *Pan American Airways, Inc.*, 58 Fed. Supp. 338.

Term and the Appellate Division applying such segment of the Warsaw Convention to the undisputed facts herein, arbitrarily deprive petitioners of their rights and personal property in their claim to recover damages in full from respondent for the wrongful death of decedent. Such deprivation of petitioners' rights and personal property is in clear contravention of the Seventh Amendment of the United States Constitution, which guarantees petitioners' rights of trial by jury as to the issue of their damages *in excess* of the sum of $8,291.87, the amount awarded to them as prescribed in the foregoing provision of the Warsaw Convention.

Petitioners further contend that in the light of the clear legal principles enunciated by this Court and the applicable decisions of other Federal Appellate Courts, the action at bar is definitely a "Suit at Common Law" within the meaning of the Seventh Amendment. Respondent's contention to the contrary is untenable.

Petitioners also urge that the State Courts definitely possess judicial power to determine whether Subdivision (1) of Article 22 of the Warsaw Convention, as one of the products of Federal action—the action of the United States Senate and the President in adhering to the Warsaw Convention—infringes the Seventh Amendment of our Federal Constitution. This proposition, too, is not open to question under the prevailing legal principles in cases adjudicated by this Court and other authorities.

It is the contention of petitioners, upon authoritative pronouncements of this Court, that the unconstitutionality and invalidity of Subdivision (1) of Article 22 of the Warsaw Convention, which is part and parcel of the transportation contract at bar (R. 62-68), fatally infects such contract at its core and renders it unenforceable to the same extent and hence no rights inconsistent with those preserved in the Seventh Amendment can be predicated upon it.

But even if the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention *does not, per se,* vitiate the purported limitation of respondent's tortious

liability as expressly incorporated in the transportation contract at bar (R. 62-68) in reference to the Warsaw Convention, petitioners further contend that such transportation contract is itself unenforceable to limit respondent's tortious liability. This is so because of respondent's conceded (R. 48-49) failure to offer decedent a choice between a lower fare and a maximum fare and a corresponding election between the lower tortious liability and the maximum tortious liability or any special contract for higher liability.

Clearly, as a matter of law, decedent did not waive for himself or petitioners the constitutional rights under the Seventh Amendment to enforce respondent's tortious liability in excess of the Warsaw Convention limits. Respondent's position in this respect is contrary to all law and authority.

3. The Special Term and the Appellate Division of the New York Supreme Court have also determined a Federal question of substance not in accordance with the established cardinal canons of construction and other legal principles, as enunciated by this Court and other authorities which govern the true legal effect of Subdivision (1) of Article 22 of the Warsaw Convention and its allied Articles 17 and 20, and the transportation contract (R. 62-68) as expressly incorporating such Articles of the Warsaw Convention.

Petitioners contend that the provisions of Subdivision (1) of Article 22 of the Warsaw Convention and its allied Articles 17 and 20 and as expressly incorporated by reference to the Warsaw Convention in the transportation contract (R. 62-68) thereunder, are fatally general, vaguely broad, ambiguous and uncertain as to the causes and the kinds of liability of respondent, and as to the persons affected thereby, and hence are not operative to limit respondent's tortious liability herein. In this connection, it is a significant indisputable circumstance that neither in the limitation of liability clauses of the Warsaw Convention (49 U. S. Stats., Part II, pp. 3000, 3018-20), nor in the

transportation contract (R. 62-68), itself, will the term "negligence" be found. Moreover, the very pivotal provisos of Article 22 are fatally infected with ambiguity and uncertainty as to the *persons* affected by the purported limitations of the carrier's liability. Article 22 reads as follows:

> "(1) In the transportation of passengers *the liability of the carrier for each passenger* shall be limited to the sum of 125,000 francs * * *."

But *to what liability* does this limitation apply, the liability of the carrier to or for the benefit of *each passenger in his lifetime*? Or the carrier's liability to or for the benefit of the surviving *widow and next of kin* of a deceased passenger?

Under the established legal principles and authorities, every proviso purportedly limiting the tortious liability of a common carrier, whether it be in a contract, *a statute, a treaty or a convention,* must be crystal clear, specific and certain in its operation. Nothing must be left to implication. (*Vide* authorities at pp. 41-43, 46-55, *infra,* of petitioners' accompanying brief.) By this standard of interpretation, the limitation of liability, as asserted by respondent herein, is not enforceable. This conclusion is strongly impelled by historical and strong moral considerations and grave principles of public policy and justice concerned with maintaining maximum safety of passengers and security for their dependents. Ever since the late eighteenth century, which marked the advent of the doctrine of restriction of a common carrier's liability in common law jurisprudence, the British and American courts have frequently, in the interests of justice, morality and public policy, invoked the principle of *strictissimi juris* in refusing to enforce it in situations like that at bar.

4. The federal questions herein are of general sociological importance and public interest, affecting as they do the substantial rights and ultimately the general wel-

fare and security of innumerable citizens, inhabitants, and families throughout the United States, including the substantial rights of petitioners as surviving widow and next of kin of decedent, Arthur Albertus Lee.

Most, if not all of such passengers, including decedent, were persons of unusual talents, accomplishments and substantial earnings. Obviously, when such persons lose their lives in airplane accidents caused by *negligence* of air carriers, the families—widows and children—cannot be deemed justly and fully compensated for their loss and adequately protected by the mere sum of Eight Thousand Two Hundred Ninety-one and 87/100 ($8,291.87) Dollars, which represents the maximum limit of the air carrier's liability as purportedly fixed in the Warsaw Convention. Since the occurrence of the tragic "Yankee Clipper" disaster, there have been several similar airplane accidents in various places on the international horizon, with attendant loss of life. Conceivably, others may occur from time to time in the future.

As early as 1930, the following observation on the liability limitation clause of the Warsaw Convention was made in 1 Journal Air Law 376:

> "* * * Responsibility is limited to 125,000 francs. * * * The author believes the limitation for passenger liability is too low in consideration of the class of persons using this method of transportation."

If, unquestionably, the limitation of the carrier's tortious liability was drastically inadequate in 1930, it is certainly extremely more so in terms of the approximately fifty per cent devaluated dollar of today!

The extreme danger to the general public inherent in so arbitrarily inequitable a provision in the Warsaw Convention for the restriction of the tortious liability of air carriers, is that, as recognized in various cases adjudicated by this Court, it will *tend to lessen considerably* the high degree of care always to be exercised by such air

carriers for the protection of passengers and their dependent families.

5. Furthermore, unless the concededly new and important serious federal questions raised by petitioners herein should be finally considered and correctly answered by this Court, they are likely to recur frequently in other similar cases in the future, with attendant substantial expense to the various suitors involved. A correct adjudication of such questions on the merits will have the salutary effect of definitely apprising the general air-travelling public of their rights under the Warsaw Convention and serving as a clear guide to courts and members of the bar throughout the land.

In their accompanying brief, petitioners present a legal analysis of the federal questions herein and demonstrate the correctness of their contentions with supporting authorities. This Court is respectfully referred thereto.

WHEREFORE, petitioners pray that this Court issue a writ of certiorari to the Supreme Court of the State of New York in the County of Westchester, toward the end that the decisions of the State Courts herein may be reviewed and reversed in conformity with the Constitution and the laws of the United States.

Dated: New York, N. Y., the 10th day of February, 1950.

MARY ELIZABETH LEE,
MARY ELIZABETH (BETTY) LEE
and WILLIAM CLAIR LEE

By .....,
HAROLD J. SHERMAN,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

Brief on Behalf of Petitioners for a Writ of Certiorari.

Opinions Below.

No opinions were rendered by any of the courts below. The two decisions (R. 42, 70) of Mr. Justice J. Gordon Flannery at Special Term of the New York Supreme Court, County of Westchester, are not officially reported. The decisions (R. 81-82, 121-122) of the Appellate Division of the New York Supreme Court in the Second Judicial Department, are officially reported in 275 App. Div. 855 (Case No. 1) and 962 (Case No. 2). The decision (R. 152) of the New York Court of Appeals is officially reported in 300 N. Y. (Dec. 31, 1949, Wkly Adv. Shts.) p. i, foll. p. 545).

Jurisdiction.

The jurisdiction of this Court is invoked under Article 3, Section 2 of the United States Constitution and Section 1257 of Title 28 of the United States Code.

Statement.

The undisputed facts of petitioners' cause of action against respondent and the history of the prior proceedings herein are outlined in petitioners' accompanying petition. It is, therefore, unnecessary to restate them here. However, reference to the dominant factual features of this case as contained in the record will be made in connection with the argument herein presented.

Specification of Errors.

The errors which petitioners desire this Court to review upon the granting of a writ of certiorari herein are set forth at pages 18-20 in the petition, which are herein incorporated by reference.

Argument and Authorities.

POINT I.

Subdivision (1) of Article 22 of the Warsaw Convention alleged in the third and fourth partial defenses, is void and unenforceable to limit respondent's tortious liability for damages because it contravenes the Seventh Amendment of the United States Constitution, which preserves petitioners' absolute right of trial by jury as to all issues of fact herein, including the issue of damages.

The pertinent provisos of Subdivision (1), Article 22 of the Warsaw Convention (49 U. S. Stats., Part II, pp. 3000, 3019) upon which respondent's alleged third and fourth partial defenses (R. 67-68) are predicated, are:

> "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the

said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

[N.B. For all that appears from the Congressional Record (78 Congress Rec., Pt. 11, pp. 11561, 11577-11582 (73rd Cong., 2nd Sess.) the Warsaw Convention along with 11 other treaties, was proposed merely in a *pro forma* manner by the late Senator Pittman of Nevada on June 15, 1934, for consideration by the Senate. The record of the proceedings of the Senate on that day is barren of any discussions whatever on the merits or the validity of any part of such convention under the Seventh Amendment or any other feature of the United States Constitution, or any of the General Laws of the United States. The formal resolution of the Senate for "adherence" by the United States to the Warsaw Convention immediately followed its reading.]

However, one of the most important rights enjoyed by all individuals living under our Constitutional form of Government is that of trial by jury in all suits at common law, involving claims of a value exceeding $20.00. This right was possessed by decedent, Arthur Albertus Lee, up to the time of his decease. It is vested in each of petitioners independently. So sacred is this right that it has been preserved against infringement by any branch or member of our Federal Government, including both houses of Congress and the President, in the Seventh Amendment of our United States Constitution.

The pertinent provisos of such Seventh Amendment are as follows (U. S. C. A. Const. Amends., p. 379):

"AMENDMENT VII—CIVIL TRIALS.

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, * * *."

This Amendment of our United States Constitution, as is true of all the first ten amendments thereof, operates

as a restriction of the powers of all branches or members of our Federal Government, including both houses of Congress and the President.

As stated in regard to the first ten amendments in *Fox* v. *Ohio,* 5 How. (46 U. S.) 410, 434, by this Court (p. 434):

> "• • • They are exclusively restrictions upon the Federal power, intended to prevent interference with *the rights* of the States and *of their citizens.*" (Emphasis supplied.)

Accord: *Lloyd* v. *Dollison,* 194 U. S. 445, 447; *Smith* v. *American National Bank,* 89 Fed. 832, 838 (C. C. A. 8th); *Livingston* v. *Mayor of New York,* 8 Wend. (N. Y.) 85, 101.

The Seventh Amendment not only controls and limits the general legislative powers of Congress and the President, but is paramount even to their treaty-making powers, (Art. 2, §2, Cl. 2, U. S. Const. U. S. C. A., p. 326) and to the extent of preserving as inviolate the right of trial by jury, operates as an insuperable curb upon them. There is nothing about a treaty or convention that is so sacrosanct, *per se,* as to immunize it against the fundamental prohibitions of our United States Constitution. Story's Commentaries on the Constitution, (5th Ed. 1905) §1508; 4 Ham. Works 342; *The Cherokee Tobacco* Case, 11 Wall (78 U. S.) 616, 620-621; The License Cases—*Thurlow* v. *Moss*—5 How. (U. S.) 505, 613; Moore's International Law Digest (1906 Ed.) Vol. V, pp. 178-179, §738, quoting Bayard, Secretary of State, to Miller; *Geofrey* v. *Riggs,* 133 U. S. 258, 267; *Thomas* v. *Gay,* 169 U. S. 264, 271; *Asakura* v. *Seattle,* 265 U. S. 332, 341; and *Bell* v. *Hood et al.,* 71 Fed. Supp. 813, 816 (U. S. D. C., S. D. Calif., Mathes, *D. J.,* 1947.)

Indeed, for all legal purposes, including tests of constitutionality, a treaty or convention is of no higher dignity than an ordinary Federal Statute or Congressional Law. (*Ex Parte Larrucea et al.,* 249 Fed. 981, 983; *Val-*

entine, etc. v. *U. S.*, 299 U. S. 5, 10; *U. S.* v. *18 Packages, etc.*, 230 Fed. 564, 569 (C. C. A. 3rd) appeal dismissed in 242 U. S. 617; Moore's International Law Digest (1906 Ed.), Vol. V, pp. 178-179, §738, quoting Bayard Secretary of State, to Miller; The License Cases,—*Thurlow* v. *Moss*—5 How. (U. S.) 505, 613.

The United States Senate and the President could not, under the guise of exercising their treaty-making powers, impose an arbitrary monetary value on the lives of Americans or limit the liability of air carriers for their acts *ex delicto* in contravention of the Seventh Amendment. In presuming to do so, they have, in effect, deprived petitioners of their respective absolute rights to a jury trial as to an important issue of fact herein concerning their substantial damages in excess of the amount prescribed in Article 22 of the Warsaw Convention. As it happens, in the case at bar, by reason of the general economic and social position (R. 25, 58) of decedent, Arthur Albertus Lee, petitioners concededly (R. 21) sustained damages in a monetary amount considerably in excess of that awarded in the judgment herein. If they can muster proof of every dollar of their damages, it is their constitutional right to present, without any restriction whatsoever, such proof to a court and jury for consideration. Upon time-honored principles of law and justice they cannot be shorn of this sacred and traditional American right, directly or indirectly, even as an incident of any exercise of the Federal Government's treaty-making power for the regulation of international navigation in the air. So substantial is the right of jury trial *that it cannot be sacrificed in the general economic or other interests of our Federal Government or any special group of adventurers in the business of common carriers of passengers by aircraft.*

31 Am. Jur. 556-557, §7; 1 Annals of Congress 424, 435; 16 R. C. L. 197, §15; *U. S.* v. *130 Barrels of Whiskey*, 27 Fed. Cases (Case No. 15,938) 281-282; *Parsons* v. *Bedford et ano*, 3 Pet. (28 U. S.) 433, 445, 447-448, opin. by the eminent Mr. Justice Story; *Ex Parte Peterson*, 253

U. S. 300, 310; Cf. *State, etc.* v. *Kohler,* 200 Wis. 518, 561, 69 A. L. R. 348, 371 (1930).

In *Ratheon Mfg. Co.* v. *R. C. A. of America,* 76 Fed. (2d) 943, 947 (C. C. A. 1st, 1935) affd. in 296 U. S. 459, the United States Circuit Court of Appeals said regarding the right to jury trial as guaranteed by the Seventh Amendment (p. 947):

> "Neither the Congress nor the courts can deprive a litigant of this right."

Accord: 3 Writings of Thomas Jefferson, (Washington Ed.) 71; 16 R. C. L. 193, §13; 31 Am. Jur. 552, §3; *Baylis* v. *Travelers Insurance Co.,* 113 U. S. 316, 321; *Diederich et al* v. *American News Co.,* 128 Fed. (2d) 144, 146 (C. C. A. 10th, 1942) an action for damages for wrongful death; *Bothwell, etc.* v. *B. E. R. Co.,* 215 Mass. 467, 476; *Patrie* v. *Murray et ano.,* 43 Barb. 323, 336, 29 How. Pr. 312, affd. by General Term of the New York Supreme Court in 43 Barb. 337; *Capitol Traction Co.* v. *Hoff,* 174 U. S. 1, 7; Cf. *Patton et al.* v. *U. S.,* 281 U. S. 276, 290 (1930).

Trial by jury in the totality of its legal conception, as understood by courts from time immemorial, embraces all issues of fact in all actions at law, including issues as to the *quantum damnum.* And under the Seventh Amendment of our Federal Constitution, petitioners' rights to have a jury assess their damages in full *secundum allegata et probata,* are absolute and inviolable.

16 R. C. L. 215, §32; id. 193, §13; 17 C. J. 1057, §361; *Dimick* v. *Schiedt,* 293 U. S. 474, 476-488; *Smyth Sales, Inc.* v. *Petroleum Heat & Power Co., Inc.,* 141 Fed. (2d) 41, 44-45 (C. C. A. 3rd, 1944); *Bothwell, etc.* v. *B.E.R. Co.,* 215 Mass. 467, 476 (1913); *Kretschmar, etc.* v. *City of New York,* 225 A. D. 761 (Case No. 4, Second Dept. 1928); *Wilkinson, etc.* v. *Boehm et al.,* 231 A. D. 295, 296 (3rd Dept., 1931).

As pronounced in *Diederich et al* v. *American News Co.,* 128 Fed. (2d) 144, 146 (C. C. A. 10th, 1942), which

cites the cases of *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 657, and *Dimick* v. *Schiedt*, 293 U. S. 474, 476, 486-487:

> "The right guaranteed by the Federal Constitution is *one of substance*, not mere form or procedure. But it is a *substantive* right which flows from the Federal Constitution which is the supreme law of the land, * * *." (Emphasis supplied.)

See also: 16 Am. Jur. 233, §348; id. 234, §352; *Birkett as Admr., etc.* v. *Knickerbocker Ice Co.*, 110 N. Y. 504, 508; *Wilkinson as Admx. etc.* v. *Boehm et al.*, 231 A. D. 295, 296 (3rd Dept., 1931).

The Action at Bar Is a "Suit at Common Law" Within the Meaning of the Seventh Amendment.

The expression "suits at common law", as used in the Seventh Amendment, is tantamount in meaning to "suits at law" or "suits peculiarly *legal in nature* and such as it was proper to assert in *courts of law* and by the *appropriate modes and proceedings of courts of law*", as distinguished from courts of equity and admiralty. It is not restricted merely to cases known to the domestic common law at the time of the adoption of our Federal Constitution. Embraced in it are all the progressively variant forms of legal rights and remedies, statutory and otherwise, which according to the course of our common law court trial procedure, are triable by a court and jury, as contrasted with purely equitable rights and remedies administered exclusively in courts of equity, or those rights and remedies which are within the exclusive jurisdiction of courts of admiralty.

31 Am. Jur. 557, §8; 16 R. C. L. 195, §14; *Parsons* v. *Bedford*, 3 Pet. (28 U. S.) 433, 446, opin. by the eminent Mr. Justice Story; *Shields* v. *Thomas et al.*, 18 How. (59 U. S.) 253, 262; *Baines* v. *The James & Catherine*, 2 Fed. Cases (Case No. 756) 410, 416; *Whitehead* v. *Shattuck*, 138 U. S. 146, 151; *Belleavance* v. *Plastic-Craft Novelty*

Co. et al., 30 Fed. Supp. 37, 38 (U. S. D. C. D. Mass. 1939), where the constitutional right of trial by jury was upheld in statutory action at law for damages for violation of a patent right; *Fleitman* v. *Welsbach Co.*, 240 U. S. 27, 29, where actions to recover damages under the Sherman Anti-Trust Statutes (26 Stat. 209; 15 U. S. C. A. §1 *et seq.*) were held triable by court and jury.

The courts have in principle upheld the constitutional *substantive right* of trial by jury *specifically under the Seventh Amendment* in statutory actions for the recovery of damages for wrongful death.

Robostelli v. *N. Y. N. H. & H. R. Co.*, 33 Fed. 796, 801 (U. S. C. C. S. D. N. Y.) and *Diederich et al* v. *American News Co.*, 128 Fed. (2d) 144, 145-146 (C. C. A. 10th, 1942) where the courts upheld the constitutional right of trial by jury in *statutory actions for the recovery of damages for wrongful death.*

But not only is the action at bar in the general category of "suits at law" within the purview of the Seventh Amendment. It is by its peculiar factual and legal features and nature a "common law" action. This is so because it is founded directly on Common Law Principles of Private International Jurisprudence or Conflicts of Law prevailing at the *lex fori*—namely, New York (*Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 106-113; *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126. While, to be sure, the foreign law of Portugal (R. 21-22, 52-56) gave rise to petitioners' rights to damages for the wrongful death of decedent, such foreign law is but an *incidental fact in the transaction.* It is not enforced as such at such *lex fori.* On the contrary, it is only the *rights* of petitioners which are enforced there, and this is done by means of a remedy springing directly from the local common law at such *lex fori.*

Beale's "Conflict of Laws", Volume One (1935 Ed.) pp. 52-53; *Gray* v. *Gray*, 87 N. H. 82, 83, 87, 174 Atl. 508 (1934); American Law Institute's Restatement, Conflict of Laws (1934 Ed.) §5, p. 9; 12 C. J. 432, §2; 2 Kent's Commentaries (11th Ed.) 454; 11 Am. Jur. 296, §3.

For definition of "common law" as embracing law of nations or international law, see Wharton's Law Lexicon (14th Ed., 1938) p. 222, right column.

Indeed, the general "common law" basis and character of the action at bar were recognized antecedents of, and known to exist as such at the time of, the adoption of our Federal Constitution and the first ten amendments therein.

11 Am. Jur. 296, §3; 1 Kent's Commentaries (11th Ed.) 1, 342-343, 473-474; 2 Kent's Commentaries (11th Ed.) 454; Holdsworthy's History of English law, Volume 5 (1924 Ed.), p. 26.

The Constitutionality of Subdivision (1) of Article 22 of the Warsaw Convention Under the Seventh Amendment Can Be Tested Legally in the Instant State Court Action at Law for Damages for the Wrongful Death of Decedent.

This proposition is sustained by the decisions in *Patrie* v. *Murray, et ano.*, 43 Barb. (N. Y.) 323, 324-337, 29 How. Pr. (N. Y.) 312, 313-326, affd. by General Term of the New York Supreme Court in 43 Barb. 337 and in *Weatherbee* v. *Johnson, et ano.*, 14 Mass. 412, 415-421, which is in all respects substantially identical with the *Patrie* case. Both of such authorities are cited with approval by this Court in *Capitol Traction Co.* v. *Hoff*, 174 U. S. 1, 11-13. In the *Patrie* and *Weatherbee* cases, the state courts affirmatively held that the constitutionality of *Federal Legislation* under the Seventh Amendment could be legally determined in the state courts. Such particular state courts even went so far as to declare the Federal Legislation before them as being partially unconstitutional under the Seventh Amendment.

As previously pointed out, a convention or treaty is of no higher dignity than an ordinary Federal statute or Congressional law (see authorities at pages 30-31, *supra*). And as is true of an ordinary Federal Statute or Congressional law, a convention or treaty, as the product of *federal action*, is subject to the prohibitions and limitations

of the first ten amendments of our Federal Constitution (see authorities at pages 29-30, *supra*). This well-established proposition is not to be confounded with the rule that the Seventh Amendment in no way restricts state legislative or judicial acts *solely with reference to and in conformity with state laws.* State courts have always been free to decide questions of unconstitutionality concerning *federal laws,* including treaties or conventions, under any of the first ten amendments of the United States Constitution. It is strictly in accordance with that very principle that petitioners herein invoke the Seventh Amendment as a means of testing the constitutionality of Federal Government action—*i.e.,* the action of the United States Senate and the President in "adhering" to the Warsaw Convention and thereby (*i.e.,* through the operation of Subdivision (1) of Article 22) arbitrarily depriving petitioners of their absolute rights to a jury trial as to all their damages in excess of twenty dollars.

By force of the foregoing principles of constitutional law and the authorities supporting them, Subdivision (1) of Article 22 of the Warsaw Convention, in arbitrarily depriving petitioners of their rights of trial by jury as to their damages in excess of the amount prescribed therein, contravenes the Seventh Amendment and is therefore void and unenforceable to limit respondent's tortious liability for damages. It is beyond question that petitioners' rights of action for the recovery of their damages in full are in law recognized to be entirely independent of those of decedent in his lifetime or of his estate and constitute rights of personal property. (*Van Beeck* v. *Sabine Towing Co.,* 300 U. S. 342, 348-351; *Clark et al* v. *Geer,* 86 Fed. 447, 448-449 (C. C. A. 8th); *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99, 104; 1 Sutherland's Law of Damages, (4th Ed.) 21, Section 6.) As such, they should be enforced under the aegis of the Seventh Amendment.

POINT II.

The transportation contract made between decedent, Arthur Albertus Lee, and respondent, pursuant to such Warsaw Convention, as alleged in such fourth partial affirmative defense, being infected at its core with the unconstitutionality of Subdivision (1) of Article 22 of such Warsaw Convention, is likewise void and unenforceable to limit respondent's tortious liability for damages.

The Warsaw Convention must, of course, be read and construed as an inherent part of the contract (R. 62-68) of transportation which expressly incorporates its provisos. (*Graybar Elec. Co.* v. *New Amsterdam Cas. Co.*, 292 N. Y. 246-251; *The Halley* [1867-1869], 2 *The Law Reports, Privy Council Appeal Cases* [Eng.] 193, 203.) And the validity of such contract (R. 62-68) in respect to the purported limitations of respondent's tortious liability, even aside from any question of construction, is directly dependent upon the constitutionality and validity *per se* of Subdivision (1) of Article 22 of such Warsaw Convention. It, therefore, follows that the aforementioned defect of such Warsaw Convention—*i. e.*, the unconstitutionality and invalidity of Subdivision (1) of Article 22 thereof, fatally infects such contract (R. 62-68) at its core and renders it unenforceable to the same extent.

As enunciated by this Court in *Norton* v. *Shelby County*, 118 U. S. 425, 442:

> "* * * An unconstitutional act is not a law. *It confers no rights;* it imposes no duties; *it affords no protection;* * * * It is, in legal contemplation as inoperative as though it had never been passed." (Emphasis supplied.)

And as promulgated by the New York Court of Appeals in *Chenango Bridge Co.* v. *Paige et al.*, 83 N. Y. 178, 191:

> "'When a statute is judged to be unconstitutional, it is as if it had never been. Rights cannot be built

> up under it; *contracts which depend upon it for their consideration are void;* it constitutes a protection to no one who has acted under it * * *. And what is true of an act void *in toto* is true also as to *any part* of an act which is found to be unconstitutional and which consequently is to be regarded as never having at any time been possessed of any legal force'." (Emphasis supplied.)

Accord: Cooley on Constitutional Limitations, Vol. 1 (8th Ed.) pp. 382-384; 12 Corpus Juris 801, §230; Clark's New York Law of Contracts, Vol. 1 (1922 Ed.) p. 626, §401; *Chicago, Indiana L. Railway Co.* v. *Hackett,* 228 U. S. 559, 566; *Ex Parte Siebold,* 100 U. S. 371, 376.

Patently, these principles apply also in respect to an unconstitutional convention or treaty. For a convention or treaty is of no higher dignity than an ordinary Federal statute or Congressional law (see authorities at pp. 30-31, *supra*).

But even if the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention *does not per se* vitiate the purported limitation of respondent's tortious liability as incorporated in the transportation contract at bar (R. 62-68) by reference to the Warsaw Convention, such transportation contract is itself unenforceable to limit respondent's tortious liability. This is so because of respondent's conceded (R. 48-49) failure to offer decedent a choice between a lower fare and the maximum fare and a corresponding election between the lower tortious liability and the maximum tortious liability or any special contract for higher liability.

Union Pac. R.R. Co. v. *Burke,* 255 U. S. 317, 321-323; *Curtiss-Wright Flying Service Co.* v. *Glose,* 66 Fed. (2d) 710, 711-713 (C. C. A. 3rd, 1933), cert. den. in 290 U. S. 696; *Conklin* v. *Canadian-Colonial Airways, Inc.,* 266 N. Y. 244, 247-248 (1935).

POINT III.

Petitioners' decedent did not waive for himself or petitioners the constitutional rights under the Seventh Amendment to enforce respondent's tortious liability in excess of the Warsaw Convention limits.

Respondent's contention that petitioners' decedent waived the constitutional rights under the Seventh Amendment to enforce respondent's tortious liability without limitation, is, as a matter of solidly established law, wholly untenable.

Admittedly (R. 48-49), respondent did not accord to petitioners' decedent a *choice* between a lower and a higher fare and between a correspondingly reduced and maximum liability or any *real* consideration for limited liability. (*N. Y. C. Railroad Co.* v. *Lockwood,* 17 Wall. (84 U. S.) 357, 379-380; *Conklin* v. *Canadian-Colonial Airways, Inc.,* 266 N. Y. 244, 247-248 and various other authorities cited at p. 38, *supra.*) When he purchased his transportation ticket from respondent for the usual maximum charge, he did so under "duress of circumstances". [*N. Y. C. Railroad* v. *Lockwood,* 17 Wall (84 U. S.) 357, 382; *Conklin* v. *Canadian-Colonial Airways, Inc.,* 266 N. Y. 244, 247-248.]

A waiver of any right cannot arise *in invitum.* It must be an act stemming from an individual's volition. The individual must be *free* to exercise his discretion in making an election—*a choice*—as between the value of one right and benefit and that of another, with full knowledge of both.

Panther Rubber Manufacturing Co. v. *Commissioners,* 45 Fed. (2d) 314, 316 (C. C. A. 1st); 67 C. J. 298; *Hodges* v. *Easton,* 106 U. S. 408, 412; *U. S.* v. *Rathbone,* 27 Fed. Cases (Case No. 16121) 711, 712; *Wheelock* v. *Lee,* 74 N. Y. 495, 501; *Hasey* v. *McMullen et al.,* 109 Minn. 332, 337; 16 R. C. L. 217, §34; 35 C. J. 202, §11, (left column); 35 C. J. 147, §12 (right column).

Besides, so sacred and so carefully guarded is one's Constitutional right of trial by jury, that the Courts indulge every presumption in its favor and against any claim of waiver. A party asserting a waiver of this most important right by another must allege and establish it clearly and convincingly. The Courts will never infer it by implication.

Hodges v. *Easton,* 106 U. S. 408, 412; *U. S.* v. *Rathbone,* 27 Fed. Cases (Case No. 16121) 711, 712; *Wheelock* v. *Lee,* 74 N. Y. 495, 501; *Hasey* v. *McMullen et al.,* 109 Minn. 332, 337; 16 R. C. L. §217, 34; 35 C. J. 202, §11 (left column); 35 C. J. 147, §12 (right column).

Moreover, decedent was in no position to conclude by any act of his, petitioners' own personal rights under the Seventh Amendment to enforce their new and independent rights to recover damages in full for his wrongful death. (*Van Beeck* v. *Sabine Towing Co.,* 300 U. S. 342, 348-351; *Clark et al.* v. *Geer,* 86 Fed. 447, 448-449 (C. C. A. 8th); 1 Sutherland's Law of Damages (4th Ed.) 21, §6, *Hamilton* v. *Erie R.R. Co.,* 219 N. Y. 343, 350-351, 353; *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99, 104, opinion by Cardozo, *J.*). Hence, petitioners cannot in law be regarded as having waived them.

POINT IV.

The provisions of Subdivision (1) of Article 22 of such Warsaw Convention and its allied Articles 17 and 20, are fatally general, vaguely broad, ambiguous and uncertain as to the causes and the kinds of liability of respondent and as to the persons affected thereby. Subdivision (1) of Article 22 and the Transportation Contract Relating Thereto are, therefore, void and unenforceable to limit respondent's TORTIOUS liability for damages.

In view of respondent's conceded (R. 48-49) failure to charge decedent, Arthur Albertus Lee, a reduced fare, or to offer him a *real* opportunity to choose as between a lower and a higher fare, and a correspondingly lower

and a higher liability, Subdivision (1) of Article 22 of such Warsaw Convention, and the transportation contract (R. 62-68) at bar, must, as to petitioners, be regarded as purportedly imposing a naked arbitrary exemption from *tortious* liability on respondent's part. (*Union Pacific R.R. Co.* v. *Burke*, 255 U. S. 317, 321-323; *Conklin* v. *Canadian-Colonial Airways, Inc.*, 266 N. Y. 244, 246-249 (1935); and various other authorities cited on pp. 38-39, *supra.*) Admittedly, petitioners' (R. 21) losses are considerably in excess of the sum of $8,291.87 as awarded in the judgment herein in consequence of respondent's responsibility for decedent's death, particularly because of his general economic and social position (R. 25, 58) during life. If respondent could not be held liable to petitioners for anything in excess of the inadequate sum of $8,291.87 — — — in terms of today's monetary values only about $4,000.00 — — — respondent would not merely enjoy self-imposed limitation of *tortious* liability, *but rather, in a substantial sense, complete immunuity from liability!*

But before arrogating to itself so harsh and unjust an advantage, respondent should be in a position to demonstrate, convincingly and satisfactorily, that the limitation provisos in the Warsaw Convention are *clearly specific and certain in every respect,* as strictly required by law and principles of justice. (See Cardinal Canons of Construction and authorities in relation thereto in Appendix A, *infra*). Indeed, the burden strictly rests on respondent to sustain the alleged validity of such drastic limitation provisos beyond the penumbra of any doubt. (*Schnell* v. *Vallescura,* 293 U. S. 296, 303-304; Moore on Carriers, Vol. I (2nd ed. 1914) §22, pp. 472-473, 517-519; *Atwood* v. *The Reliance Transportation Co.,* 9 Watts (Pa.) 87, 88; *Perkins, etc.* v. *The N. Y. C. R. R. Co.,* 24 N. Y. 196, 206; *Compania de Navigacion La Flesha* v. *Brauer,* 168 U. S. 104, 119-120.)

Under the established legal principles and authorities, every proviso purportedly limiting the *tortious* liability of a common carrier, whether it be in a *contract,* a *statute,* a *treaty,* or a *convention, must be crystal clear, specific,*

and certain in its operation. Nothing must be left to implication.

10 C. J. 181; *Compania de Navigacion la Flecha* v. *Brauer,* 168 U. S. 104, 123-124; *Kenny* v. *N. Y. C. & H. R.R. Co,* 125 N. Y. 422, 425-426; *Nicholas et al* v. *N. Y. C. & H. R.R. Co.,* 89 N. Y. 370, 374, 375; see also Cardinal Canons of Construction and various other authorities cited thereunder in Appendix "A", *infra.*

The case of *Wheeler* v. *O. S. N. Co.,* 125 N. Y. 155, 160-161, pointedly demonstrates that *even a federal statute* must yield to the paramount rule of law that a common carrier cannot by mere general and broad language restrict his liability for negligence. There an enactment of Congress (§4281 of the Revised Statutes), purportedly exonerated, in general terms, a common carrier by water from liability for particular goods under certain circumstances. There the New York Court of Appeals ruled that such statute must be strictly construed so as to exclude only such common carriers' liability as an insurer for "losses by accident or mistake" (p. 160), without affecting in any way such common carriers' liability for *negligence* because such statute "does not by *clear and definite language indicate its purpose to go further*" (p. 161). (Emphasis supplied.)

To same effect: *La Bourgogne,* 144 Fed. 781, 786-787 (C. C. A. 2d, 1906), affd. in 210 U. S. 95 (1907).

If even a federal statute is controlled by the prevailing rule of law relied on by petitioners, so, too, is a treaty or convention of the United States with any foreign country. For a treaty or convention is of no higher dignity than an ordinary Federal statute or Congressional law. (See authorities at pp. 30-31, *supra.*) Moreover, a treaty or convention must, like all contracts and statutes, be construed in the light of established principles of construction. (*Tucker* v. *Alexanderoff,* 183 U. S. 424, 437; *Hamilton* v. *Erie R.R. Co.,* 219 N. Y. 343, 353; *Re Zalewsky,* 292 N. Y. 332, 336-337; *Wright* v. *Henkel,* 190 U. S. 40, 57.)

As the New York Court of Appeals has stated (*Kenny* v. *N.Y.C. & H. R. R. Co.*, 125 N. Y. 422, 425-426) mere "general words and language *capable of other operation,* will not be construed to limit the responsibility of the carrier for *negligence.*" (Emphasis supplied.)

And as this Court has said (*Compania de Navigacion La Flecha* v. *Brauer,* 168 U. S. 104, 119-120):

> "'*The language is general and broad and might very well comprehend every description of risks* incident to the shipment. But we think it would be going farther than the intent of the parties upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence or *want of ordinary care,* either in the seaworthiness of the vessel, her proper equipments and furniture, or *in the management by the master and hands'.*" (Emphasis supplied.)

As appears from the very face of the broad and general language of Articles 17, 20, and 22 of the Warsaw Convention, it "comprehends every description of risks incident to" the transportation of passengers, thereby going further than what the law of proper legal construction permits.

Article 17 of the Warsaw Convention (49 U. S. Stats. at Large, Pt. II, 3013, 3018) which is part and parcel of the transportation contract (R. 62-68) at bar provides:

> "The carrier *shall be liable for damage sustained* in the event of *the death* or *wounding of a passenger* or *any other bodily injury* suffered by a passenger, *if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.*" (Emphasis supplied.)

In passing for a moment, it may be noted that Article 17, in the same breath, so to speak, generally and broadly

refers to the carrier's liability for "death or * * * bodily injury suffered by a passenger".

Now, the pertinent provisos of Article 20 of the Warsaw Convention are:

> "(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Again, it should be noted that the reference in Article 20 to "damage" is rather broad and general.

And it is in connection with Articles 17 and 20 that Subdivision (1) of Article 22 states so far as is germane to the issue:

> "(1) In the transportation of passengers *the liability* of the carrier *for each passenger* shall be limited to the sum of 125,000 francs. * * * " (Emphasis supplied.)

Now, after reading the foregoing Articles, separately or together, where is there to be found any clear or specific mention of the particular type or category of liability which the average passenger could fairly be deemed to understand as being embraced within the limitation provisos of Article 22?

Obviously, Article 17 speaks of a general liability for "damage". To be sure, in connection with this, there is a clause in it:

> " * * * if the accident which caused the damage so sustained took place on board the aircraft * * *."

But, what specific type or category of accident is referred to by these words? An accident caused by *whom?* An accident caused by acts of fellow passengers, or strangers, or by acts of the carrier's agents and employees? It is universally recognized as established by law, that every

common carrier is held strictly responsible for the exercise of a high degree of care to prevent accidents and injuries to passengers *from acts of even fellow passengers or strangers, irrespective of whether such acts be those of negligence or wilfulness.* 10 Am. Jur. 256-259; 13 C. J. S. 1294-1296; 4 R. C. L. 1184, §§606-607; *Carpenter* v. *B. & A. R.R. Co.,* 97 N. Y. 494, 497-501; *Steamboat Co.* v. *Brockett,* 121 U. S. 637, 645-646; *Giblett* v. *Garrison, etc.,* 232 N. Y. 618, 619; *Ferry Companies* v. *White,* 99 Tenn. 256, 257-272, 38 L. R. A. 427; *Shaw* v. *C. & G. T. R. Co.,* 123 Mich. 629, 631-637; *Kuhlen* v. *B. & N. S. R. Co.,* 193 Mass. 341, 342-351; *Putnam* v. *B. & S. A. R.R. Co.,* 55 N. Y. 108, 112-119; *Lynch* v. *N. Y. Cent. & H. R.R. Co.,* 8 A. D. 458, 461-464. In view of this, it is conceivable that the purported limitation of the carrier's liability was intended to apply only in respect to the acts of those NOT in its own service, such as fellow passengers or strangers, and NOT AS TO ACTS OF ITS OWN AGENT OR SERVANTS. Yet, there is nothing anywhere in the Warsaw Convention and the transportation contract (R. 62-68) to indicate plainly or specifically whether their limitation provisos are to apply to either type or category of liability. Nor are there any plain or crystally clear words to be found therein to show whether the purported restriction of the carrier's liability relates to *any negligent acts* of the carrier's *managerial* agents, as distinguished from its *subordinate* agents or servants. (Cf. *Perkins, etc.* v. *N. Y. C. R.R. Co.,* 24 N. Y. 196, 203-206, 213-214, where the New York Court of Appeals held that a restriction of defendant's liability on account of *"negligence"* but otherwise couched in broad and general terms, applied only to negligent acts of defendant's subordinate servants and not to those of its managing agents. Accord: *Lee* v. *The Village, etc.,* 40 N. Y. 442, 451; *Anderson* v. *Erie R. R. Co.,* 171 A. D. 687, 693 [3rd Dept. 1916] affd. in 223 N. Y. 277 [1918].) In these respects the language of the foregoing provisions of such Warsaw Convention and transportation contract (R. 62-68) is too

general and vaguely broad to be enforceable as to respondent's *own acts of negligence.* (*The Caledonia,* 157 U. S. 124, 127; *The Majestic,* 166 U. S. 378, 386; *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174; *Compania de Navigacion La Flesha* v. *Brauer,* 168 U. S. 104, 119-120.)

Concerning the provisions of Articles 17, 20, and 22 of the Warsaw Convention, and the transportation contract, (R. 62-68) it may be fairly asked: Do they apply to accidents caused by *gross negligence* of the carrier or only those due to its acts amounting to *ordinary negligence?* In this regard, too, nothing plain or specific on the subject can be found in the language of such Articles or anywhere else in such Warsaw Convention and the transportation contract (R. 62-68).

[N.B. In *N. Y. C. R.R. Co.* v. *Lockwood,* 17 Wall (84 U. S.) 357, 382-383, this Court held that the doctrine of the different degrees of due care, with their correlative juridical concepts to denote their absence in given situations, such as "gross negligence", "slight negligence", and "ordinary negligence", "is too firmly settled and fixed in the law to be ignored or changed". Vide, also, *Dalton* v. *Hamilton Hotel Operating Co., Inc.,* 242 N. Y. 481, 489 (1926).]

In the case at bar, one of the indisputable salient circumstances is that neither in the limitation of liability clauses of the Warsaw Convention (49 Stat. Pt. II, pp. 3018-3020) nor in the transportation contract (R. 62-68) itself, will the term "negligence" be anywhere found! Such patent absence of particularity in this respect renders inoperative the clauses of the Warsaw Convention and transportation contract (R. 62-68) purporting to limit respondent's *tortious* liability for damages to petitioners.

In *Wells et al* v. *Steam Navigation Co.,* 8 N. Y. (4 Seld), 375, 379, the New York Court of Appeals declined to enforce a clause purportedly in general and broad terms immunizing defendants from liability. The Court, in that

connection, significantly emphasized the generality of the contract before it, as follows (p. 379):

> *"In this contract nothing is said about negligence."* (Emphasis supplied.)

[N.B. The *Wells* case is cited in the *Nicholas* case (89 N. Y. 370, 374) and in *Hooper* v. *Wells Fargo & Co.*, 27 Cal. 11, 32; and the *Hooper* case is cited with approval by this Court in *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, 186-187.]

In connection with Articles 17, 20, and 22, another important consideration presents itself. It is established law that every common carrier is liable for injuries to passengers occasioned by wilful and malicious acts of its agents and employees, even when done *outside the scope of their employment and service,* and deliberately to satisfy their personal animus or purposes, so long as *the occurrence is in connection with the carrier's duty of safe transportation* (10 Am. Jur. 263-264, §§1447-1448; *Stewart* v. *B. & C. R.R. Co.*, 90 N. Y. 588, 591, 594; *Dwinelle* v. *N. Y. C. & H. R. R. Co.*, 120 N. Y. 117, 122, 125-127; *Kansas City S. Ry. Co.* v. *Willsie,* 224 Fed. 908, 909-913). Accordingly, it behooves us to inquire: Were Articles 17, 20, and 22 intended to apply rather to this peculiar category of liability to passengers, or to just negligent acts of the carrier's agents and employees *within the scope* of their employment? The Warsaw Convention and the contract of transportation (R. 62-68) will be searched in vain for any plain or specific expression on this subject. To be sure, Article 25 thereof deals with wilful misconduct, excluding such conduct from the operation of the limitation on the carrier's liability. But its express terms relate solely to (1) the carrier's personal wilful misconduct, and (2) the wilful misconduct of the "agent of the carrier *acting within the scope of his employment*". (Emphasis supplied.)

In *Louisville, New Albany & Chicago Ry. Co.* v. *Nicholai,* 4 Ind. App. 119, 126, the court held that a contractual restriction of liability "not for loss or damage from a particular cause"—but rather *generally as to amount only*—will not preclude recovery of the full amount of a loss arising from the common carrier's negligence.

In *Black* v. *Goodrich Transportation Co.,* 55 Wis. 319, 325-326, there was involved a clause purportedly limiting in general terms the amount of damages for which the common carrier would be liable without reference to or mention *of any particular cause* of damages. Said the court:

> "(p. 325) The courts all seem to hold that a carrier will not be held to have limited his liability against his own or his agent's negligence, *unless his contract expressly so provides.* * * * "

And in *Moulton* v. *St. Paul, M. & M. Ry. Co.,* 31 Minn. 85, 89, the Court said:

> "The same reasons which forbid that a common carrier should, even by express contract, be absolved from liability for his own negligence, *stand also in the way of any arbitrary preadjustment of the measure of damages,* where the carrier is partially relieved from such liability * * *." (Emphasis supplied.)

Accord: 10 Am. Jur. 121, §1149; Moore on Carriers, Vol. 1 (2nd Ed. 1914), p. 497; *New Jersey Navigating Co.* v. *Merchants Bank,* 6 How. (47 U. S.) 344, 382-384; *Inland Waterways Corp.* v. *Hallett, etc.,* 52 Fed. (2d) 13, 16 (C. C. A. 8th, 1931); *Burrus, etc.* v. *Chicago, etc. et al.,* 131 Fed. (2d) 532, 534-535 (C. C. A. 10th, 1942) cert. den. in 318 U. S. 773; *Saunders* v. *Southern Railway Co.,* 128 Fed. 15, 20-23 (C. C. A. 6th, 1904); *Central of Georgia Railway Co.* v. *Murphey, et ano.,* 113 Ga. 514, 518-519.

Furthermore, the very pivotal provisos of Article 22 are fatally infected with ambiguity and uncertainly as to the persons affected by the purported limitations of the carrier's liability. Article 22, as previously stated, reads as follows:

> "(1) In the transportation of passengers *the liability of the carrier for each passenger* shall be limited to the sum of 125,000 francs. * * * "

But, *to what liability* does this limitation apply? The liability of the carrier *to or for the benefit of each passenger in his lifetime?* Or the carrier's liability to or for the benefit of the surviving widow and next of kin of a deceased passenger? (Cf. *Clark* v. *Greer,* 86 Fed. 447, 448 [C. C. A. 8th]; *The Chicago, R. I. & P. Ry. Co.* v. *Martin,* 59 Kan. 437, 448, 53 Pac. 461, 464-465, affd. in 178 U. S. 245.)

The word "for" is a preposition and so far as concerns its possible applicable meanings, is thus defined in Funk & Wagnalls' New Standard Dictionary (1941 Ed.):

> "2. With a view to: In order to effect, *reach, benefit,* please etc.,: indicating the *final* cause or *object sought* in the following ways: * * * (3) as *a person whose welfare or enjoyment is desired,* or as a wished for event; opposed, in general, to against; *in favor of or behalf of;* * * *
>
> * * * * *
>
> "4. With reference or regard to; in relation to; * * * "

Clearly, by specific meaning number 2, subdivision (3) *supra,* of the word "for", the limitations of Article 22 could only apply to the liability of the carrier *for the benefit* of each passenger *in his lifetime* as to personal injuries sustained by him. But by the broad meaning under number 4, *supra,* of the word "for", Article 22 is susceptible of at least two constructions. Reasonably and fairly construed, its proper meaning is that the liability of

the carrier to or for the benefit of each passenger during his lifetime shall be limited to 125,000 francs. On the other hand, it vaguely suggests that the general liability of a carrier regarding each passenger—whatever such generic idea can possibly mean—shall be limited to 125,000 francs, no matter to whom. But, any treaty, convention, or contract which is susceptible of two constructions, one against the common carrier, and the other possibly in its favor, is, in law, ambiguous and uncertain, and must, accordingly, be construed most strongly against the common carrier, and most liberally in favor of claimants. (In this connection see Cardinal Canons of Construction and authorities thereunder in Appendix "A", *infra*.

Of interest, in connection with the question of the ambiguity and uncertainty in Article 22 of the Warsaw Convention as to the persons affected by the purported limitation of the carrier's liability, is the case of *Clark et al.* v. *Geer,* 86 Fed. 447, 448-449 (C. C. A. 8th). There decedent was killed while riding as a passenger on a railroad train. The transportation contract between him and the railroad company, in its pertinent provisos, read as follows:

> " * * * and the holder hereof agrees that the company shall not be liable *to him* in any manner as a passenger, or *for any accident resulting to him* from the operation of the train on which he rides, or from the manner of handling the same by the employees of the company; and he further agrees that the company shall not liable *to him* for injury to the person or property of the person using this ticket, unless the same is caused by the gross negligence of the company; and he further agrees that in no case shall the liability of the company exceed the sum of $1,000."

In construing the quoted language of such transportation contract the United States Circuit Court of Appeals held (pp. 448-449):

"• • • Even if it was competent for the deceased to have done so, the contract in question will not bear the construction that he attempted to place a limit upon the amount which might be recovered *by his personal representative, suing for the sole benefit of his widow, children, or next of kin,* in case he received a fatal injury for which his personal representative could alone sue. • • • the agreement upon which the defendant companies rely to limit the damages that may be recovered shows, as we think, that the deceased was contracting solely with reference to a liability of the carrier to himself, *and not with reference to the statutory liability of the carrier to others, in case of his death through the wrongful act, neglect, or default of the carrier.*" (Emphasis supplied.)

Accord: *The Chicago R.I.P. Ry. Co.* v. *Martin,* 59 Kan. 437, 448, 53 Pac. 461, 464-465, affd. in 178 U. S. 245.

Historical Considerations Impelling Acceptance of Petitioners' Contentions.

Historically speaking, the doctrine of restriction of a common carrier's liability originated at Westminster Hall in England in the late 18th Century. (2 Kent's Com. [14th Ed.] 607-608; Moore on Carriers, Vol. I [2d Ed. 1914], §19, p. 463.) However, in the first few years of its operation it was realized that the doctrine tended to relax the high responsibilities and duties imposed by law on common carriers for the good of the general public, and its introduction was exceedingly regretted by the English jurists. (2 Kent's Com. [14th Ed.] 607-608 [1814]; *Down* v. *Fromont,* 4 Camp. 40-41, 171 Eng. Rep. 13-14 where Lord Ellenborough said lamentably [p. 41]: "I am very sorry for the conveniences of trade, that carriers have been allowed to limit their common law responsibility • • •") Accordingly, whenever a common carrier invoked its benefit by means of a mere public notice or special contract, it was applied as a shield to such common carrier "only from extraordinary events, or from

that responsibility by mistake or inadvertence *which belongs to him as an insurer, and not from the consequences of the want of due and ordinary personal care and diligence.*" (2 Kent's Com. [14th Ed.] 607-608; *N. Y. C. R. R. Co.* v. *Lockwood,* 17 Wall. [84 U. S.] 360, 363-364.)

And when, with the passage of time, the doctrine of restriction of a carrier's liability has gradually extended itself to acts of negligence, the British and American courts have held it in check by consistently invoking the principle of *strictissimi juris.* They have been steadfast in their insistence, for the protection of the rights of the general public, that common carriers express the restriction or limitation of their liability in clear, specific, unmistakable, and understandable terms. (2 Kent's Com. [14th Ed.] 607-608; Moore on Carriers, Vol. I [2d Ed. 1914] §3, p. 428; *Compania De Navigacion La Flecha* v. *Brauer,* 168 U. S. 104, 123-124; *Smith, etc.* v. *N. Y. C. R. R. Co.,* 29 Barb. 132, 137-142, affd. in 24 N. Y. 222.)

The Gross Immorality, Impolicy, and Injustice of the Warsaw Convention's Arbitrary Restriction of the TORTIOUS Liability of Air Carriers.

Underlying this vigilant and paternal attitude of the courts is their keen sensitivity to the crying demands of good conscience and fundamental principles of morality and justice to safeguard passengers and their dependent families against irresponsibility and cupidity of the more powerful carriers. It is recognized by the courts that passengers do not stand on an equality with common carriers, and that very often they are at a very unfair disadvantage in dealing with common carriers. (Shearman & Redfield on Negligence, Vol. 13 [Rev. Ed. 1941] §512, p. 1300; *N. Y. C. R. R. Co.* v. *Lockwood,* 17 Wall. [84 U. S.] 379-380; *Hartford Fire Ins. Co. et al.* v. *C. M. & St. Ry.* Co., 70 Fed. 201, 205-206 [C. C. A. 8th] affd. in 175 U. S. 91; *Oceanic Steam Nav. Co.* v. *Corcoran,* 9 Fed. [2d] 724, 727 [C. C. A. 2d, 1925] which is cited with approval in *Pager* v. *The Pennsylvania R. R. Co.,* 165 Fed. [2d] 56

[C. C. A. 2d, Dec. 1947].) Knowing that passengers must travel and that because of pressure of business or other personal circumstances, they often have insufficient time to make arrangements for their transportation, carriers frequently foist upon passengers unreasonable and unconscionable conditions, such as arbitrary limitations of liability, in the most general, broad, vague, and ambiguous terms. (*N. Y. C. R. R. Co.* v. *Lockwood,* 17 Wall. [84 U. S.] 361-374; *Hartford Fire Ins. Co. et al.* v. *C. M. St. Ry. Co.,* 70 Fed. 201, 205-206 [C C. A. 8th] affd. in 175 U. S. 91.) But under the law, common carriers must accept and carry all fare-paying passengers without the imposition of any such arbitrary, unreasonable and unjust conditions. (Shearman & Redfield on Negligence [Rev. Ed. 1941] Vol. 13, §494, pp. 1232-1233, §511, pp. 1298-1299; Story on Bailments [8th Ed.] §591, pp. 580-581; *Alexander et al.* v. *Greene,* 7 Hill [N. Y.] 533, 566; *Curtiss Wright Flying Service Inc.* v. *Glose,* 66 Fed. [2d] 710, 712, cert. den. 290 U. S. 696; *Conklin* v. *Canadian Colonial Airways,* 266 N. Y. 244, 246-247.)

It is largely because of such inequality between passengers and the all-powerful common carriers and the paramount duty devolving upon common carriers for public safety, that any condition which arbitrarily or in general, broad, vague, and uncertain terms purports to restrict the liability of common carriers, will be deemed to have been extorted under "duress of circumstances". (*N. Y. C. R. R. Co.* v. *Lockwood,* 17 Wall. [84 U. S.] 357, 382; Moore on Carriers, Vol. I [2nd Ed., 1914] §9, p. 438.)

The great and vicious evil of such illegal conditions in transportation contracts is their *tendency to reduce considerably* the highest incentives, for the exercise by carriers of due care for the protection of passengers and their dependents. (Richardson on Contracts [1926 Ed.] p. 144, §171; *St. Louis, etc.* v. *Pitcock,* 82 Ark. 441, 447 [1909].)

In this connection the statement of this Court in *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174, 183, is

particularly apposite. Paraphrasingly and analogously quoted, it is as follows:

> "* * * Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors [passengers and their dependents] and makes common carriage more unreliable." (Bracketed insertion supplied.)

Accord: *N. J. Steam Navigation Co.* v. *Merchants Bank,* 6 How. (47 U. S.) 344, 427; *Smith, etc.* v. *N. Y. C. R. R. Co.,* 24 N. Y. 222, 231.

The evil of such illegal conditions is all the more reprehensible when it is realized that the contracts containing them invariably involve situations "where one person is dealing contemporaneously with several others so that a bargain limiting his liability to one of them is considered to have a tendency to lead to conduct injurious to others." (*Williston on Contracts* [Rev. Ed. 1936] Vol. 6, §1751C, p. 4968.)

The principles of public policy and social justice designed to eradicate arbitrary and unjust restrictions of the *tortious* liability of carriers, are sharply enunciated in *Smith, etc.* v. *N. Y. C. R. R. Co.,* 24 N. Y. 222, 231-232, in these words:

> "* * * The State is interested not only in the welfare, but in the safety of its citizens. To promote these is a leading object of government. Parties are left to make whatever contracts they please, *provided no legal or moral obligations is thereby violated or any public interest impaired;* but when the effect or tendency of the contract is to impair such interest, *it is contrary to public policy and void* * * *." (Emphasis supplied.)

Accord: *Cf. Johnston* v. *Fargo, etc.*, 184 N. Y. 379, 385-386; *Hughes* v. *Penn. R. R. Co.*, 202 Pa. 222, 228 (1902), affd. in 191 U. S. 477.

In the light of the Cardinal Canons of Construction (see Appendix "A", *infra*) and the cases decided by this Court and the various other authorities (see pp. 41-43, 46-52, inclusive, *supra*) the courts, upon principles of morality, public policy, and justice, will not enforce stipulations or provisos in limitation of a common carrier's *tortious* liability where, as in the case at bar, the language of the Convention and the contract (R. 62-68) is not plain and specific so as to enable passengers to comprehend unmistakeably the particularly ground or category of liability which is limited—*i. e.*, (a) ordinary negligence, or (b) gross negligence of the carrier, his managerial agents and his subordinate employees, or (c) negligent or wilful acts of fellow passengers and strangers, or (d) wilful and malicious conduct of the carrier's employees when occurring *outside the scope* of their employment but in connection with the discharge of the carrier's duty of safe transportation. And from the *Clark* and *Martin* cases (pp. 50-52, *supra*) it is clear that the Courts will not by implication apply a clause generally limiting liability so as to affect the distinct and independent property rights of a deceased passenger's surviving widow and next of kin in the damages recoverable for his wrongful death.

Accordingly, Subdivision (1) of Article 22 of the Warsaw Convention and the transportation contract (R. 62-68) are void and unenforceable to limit defendant's *tortious* liability for damages.

POINT V.

The Garcia and the three other Warsaw Convention cases cited by respondent are sui generis and, therefore, none of them is decisive of the distinctly new issues at bar.

The Garcia Case.*

In that case no question concerning the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention, *under the Seventh Amendment,* and the legal effect of such *particular unconstitutionality* upon the transportation contract (R. 62-68) at bar, was presented to, or considered and determined by, the Special Term Court, the Appellate Division, or the Court of Appeals.

The only constitutional questions therein raised and determined specifically related to Article 1, Section 8, Cl. 3, and the Fifth Amendment of our Federal Constitution. *Under these particular divisions* of our Federal Constitution, plaintiffs contended that the Warsaw Convention was void as *a whole* because it infringed the exclusive commerce powers of Congress to act on its subject matter, and that it deprived plaintiffs of their property rights without due process of law. Plaintiffs there contended also that such Warsaw Convention was not self-executing, and was, therefore, void *in its entirety.*

There, too, no question as regards the construction and the unenforceability of the vaguely broad, ambiguous, and uncertain terms of Articles 17, 20, and Subdivision (1) of Article 22 of the Warsaw Convention, and the transportation contract (R. 62-68) at bar, was presented to, and considered and determined by, the Special Term or the appellate courts.

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*183 Misc. 258, affid. in 269 App. Div. 289 (Sec. Dept.), affd. without opinion in 295 N. Y. 852, cert. den. for want of final judgment in 329 U. S. 741; and related case in 274 A. D. 996 (Sec. Dept.), leave to appeal denied by Court of Appeals on April 14th, 1949, unreported officially, cert. den. finally in 338 U. S. 824.

The Wyman Case.

(181 Misc. 963, affd. without opinion in 267 App. Div. 947 (1st Dept.), affd. without opinion in 293 N. Y. 878, cert. den. in 324 U. S. 882.)

There, too, as in the *Garcia* case, no question concerning the unconstitutionality of Subdivision (1) of Article 22 of the Warsaw Convention under the Seventh Amendment, and the legal effect of such particular unconstitutionality upon the transportation contract (R. 62-68) at bar, was presented to, or considered and determined by, the trial court or the appellate courts.

In that case, no question as regards the construction and the unenforceability of the vaguely broad, ambiguous, and uncertain terms of Articles 17, 20, and Subdivision (1) of Article 22 of the Warsaw Convention and the transportation contract (R. 62-68) at bar, as urged by petitioners herein, was presented to, or considered and determined by, the trial court or the appellate courts.

Patently, the trial court's holding (p. 964) that the Warsaw Convention became "part of the law of the land superseding state law", is founded on nothing more than a sweeping general assumption of the impregnability of such Warsaw Convention to all possible serious objections to its constitutionality and validity. There at the trial plaintiffs predicated their entire case upon the exception (Art. 25, subd. [1], 49 Stats. at Large, Pt. II, 3000, 3020), in such Warsaw Convention—*i. e.*, defendant's wilful misconduct—and upon that ground, principally, sought to impose unlimited liability on defendant.

There, as it happened, the trial court found that plaintiffs failed to prove not only wilful misconduct, but *any negligence* whatever. The trial court likewise found that defendant was not "able to offer any proof in rebuttal of the presumption of liability (Art. 20)" (p. 965). In that situation, therefore, the trial court resorted to the presumption of negligence afforded by Article 20 of such Warsaw Convention to preclude dismissal of plaintiffs'

case. And being without benefit of the particular serious objections urged in the case at bar, regarding the invalidity of the purported limitations of defendant's liability, the trial court awarded a judgment to plaintiffs merely for the amount prescribed in such Warsaw Convention.

In the absence of any opinions in the appellate courts, the affirmance of the judgment of the trial court must be regarded as restricted to the precise issues necessarily decided by such trial court.

The Ross Case.

(299 N. Y. 88.)

That case involved a question of whether a passenger's ticket was delivered to plaintiff as required by Article 2 of the Warsaw Convention. None of the new and serious legal questions in the case at bar was presented therein. It is noteworthy, however, that the strong dissent by Judge Albert Conway, with the concurrence of Judge Edmund H. Lewis, in that case (pp. 99-112) reveals a lamentable judicial awareness of, and discontentedness with, the extreme harshness and injustice of the limitation of liability for tortious acts of common air carriers as prescribed in the Warsaw Convention.

The Indemnity Insurance Case.

(58 Fed. Supp. 338.)

There, too, as in the *Wyman* case and the *Garcia* case, none of the serious objections presented in the case at bar was raised or considered and decided. The only constitutional questions before the Court were those specifically relating to Article I, Section 8, Cl. 3, and the Fifth Amendment of our Federal Constitution. The decision there is consequently of no greater scope than the *Garcia* case.

The mere existence of prior decisions upholding the constitutionality of any legislative act is of no significance

to a subsequent case where it is sought to test the constitutionality of the same act upon entirely *new and different* grounds.

As stated by this Court in *St. Louis R. R.* v.. *Terre Haute R. R.*, 145 U. S. 393, 403-404:

> "* * * Upon questions discussed in the opinion and not necessary to the judgment, *or not considered* at all, the case cannot be regarded as a decision because, as observed by Mr. Justice Curtis speaking for this Court, *'to make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties.' Carroll* v. *Carroll*, 16 How. 275, 287." (Italics supplied.)

Accord: *Bowman* v. *Mutual Benefit Health & Accident Ass'n*, 99 Fed. (2d) 856, 858 (C. C. A. 8th, 1938), which clearly emphasizes the limitations on the doctrine of *stare decisis; Dougherty* v. *Equitable, etc.*, 266 N. Y. 71, 88; *Cf. Realty Revenue Corporation* v. *Wilson, etc.*, 181 Misc. 802, 804 (N. Y. Supreme Court, Walter, *J.*, 1943); *Nashville C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 414, 415; *Municipal Gas Co., etc.* v. *The Public Service Commission*, 225 N. Y. 89, 96.

Accordingly, the aforementioned four cases concerning the Warsaw Convention are *sui generis*, and, therefore, none of them is decisive of the distinctly new issues at bar.

Conclusion.

The business of the transportation of passengers by air has been established as a successful and lucrative enterprise since two decades ago. As early as 1928—about six years before the United States adhered to the Warsaw Convention—Cardozo, *Ch. J.*, in *Hesse* v. *Rath et al.*, 249 N. Y. 436, 438, judicially observed: "Aviation is today an established method of transportation". In 1933 it was stated in *McCusker* v. *Curtiss Wright Flying Service, Inc.*,

269 Ill. App. 502, 527: " * * * Aviation is no longer an experiment. Great airplane lines are engaged in the transportation of passengers, mail and express". This enterprise has very rapidly grown by leaps and bounds. It now covers the far-flung corners of the world. (Encyclopedia Britannica, Vol. 2 [1942 Ed.] at pp. 804-805, and other Statistical Data on Aviational Progress in Appendix B, *infra*).

While a total of 417,505 passengers was flown for an aggregate of 103,747,249 passenger air miles traversed in 1930, a substantially greater number of 4,380,610 passengers was transported by plane for an aggregate of 1,676,-949,226 passenger air miles traversed. (See Statistical Data on Aviational Progress during the past twenty-six year period in Appendix B, pp. B-3 to B-4, *infra.*) In a word, the aviation industry has attained generally full maturity.

In view of this, there can be no valid reason why common air carriers, including Pan American Airways, Inc., should not sustain their full responsibilities as such to the general public. Certainly, if the general law (see various authorities on pp. 38-39, *supra*) requires domestic air transportation companies, railroads and bus companies to furnish maximum liability to passengers who demand it for tortious accidents, it should also, as a matter of social justice for the protection of such passengers and their families, impose the same obligation upon international air carriers. Subdivision (1) of Article 22 of the Warsaw Convention cannot in law be accepted as establishing an exceptionally harsh rule of limited tortious liability. To do so would mean nothing less than a reckless subversion of basic juridical concepts in our jurisprudence and transcendental considerations on the values of human life and the high duties resting on common carriers for its preservation. Subdivision (1) of Article 22 is clearly repugnant to the Seventh Amendment of the United States Constitution, and, therefore, invalid. The presumptions of the law safeguard the rights of the general public under the Seventh Amendment. (16 R. C. L. 217, §34; 35 C. J. 202,

§11 [left col.]; *Hodges* v. *Easton,* 106 U. S. 408, 412.) Moreover, Subdivision (1) of Article 22 and the transportation contract (R. 62-68) are fatally infected with vagueness, uncertainty, and ambiguity. Such stipulations of limited liability must be strictly construed against the air carriers and most liberally in favor of passengers and the general public. In the case at bar, the paramount guide to judicial decision is a time-honored principle expressed in *Broom's Legal Maxims* (10th Ed., 1939) at page 1:

> "*Salus Populi Est Suprema Lex.* (XII Tables Bacon Max. reg. 12)—Regard for the public welfare is the highest law."

The same legal fundament is tersely stated by the juristic luminary, Benjamin N. Cardozo, in *The Nature of the Judicial Process* (1921 Ed.) at page 66:

> "The final cause of law is the welfare of society. The rule that misses its aim cannot *permanently* justify its existence. * * *" (Emphasis supplied.)

Certainly, this principle is in no way transcended by the rule that a treaty or convention, *if* found to be in all respects constitutional, is the law of the land. (Art. 6, Cl. 2, 2 U. S. Const. Anno. 692.) For it pervades the judicial process controlling the construction of a treaty or convention and the judicial determination of the scope of its validity.* (See Cardinal Canons of Construction applicable

*In this connection, see "The Supreme Law, The Law of Right and Reason" an illuminating article by Honorable Harold P. Burke, United States District Judge in the Western District of New York, in the Sept. 23 and 26, 1949 issues of the New York Law Journal, pp. 582, 598. Such article cites several decisions of this Court as illustrations of alert and profound judicial regard for the natural law and "immutable principles of justice" as paramount considerations under our Federal Constitution. Some of the cases cited are: *Holden* v. *Hardy,* 169 U. S. 366, 289-390; *Herbert* v. *Louisiana,* 272 U. S. 312, 316; *Girouard* v. *U. S.,* 328 U. S. 61, 68 (1945), and *The Slaughter-House* Cases, 16 Wall. (83 U. S.) 76).

to all treaties and conventions, statutes and contracts, in Appendix "A", *infra.*) And by all the standards of law and justice favoring the public welfare, the conclusion is inescapable that Subdivision (1) of Article 22 of the Warsaw Convention and the transportation contract (R. 62-68) are void and unenforceable to limit the tortious liability of defendant, Pan American Airways, Inc., for damages.

Accordingly, for all the reasons stated herein and in the accompanying petition, and in the interests of justice, a writ of certiorari should be granted.

Respectfully submitted,

HAROLD J. SHERMAN,
Attorney for Petitioners.

Appendix A.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1949.

No. .....

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

Cardinal Canons of Construction Controlling Warsaw Convention and Transportation Contract Thereunder.*

*These cardinal canons of construction are to be considered in connection with petitioners' argument under Point IV at pp. 40-55, *supra*, of the annexed brief.

Cardinal Canons of Construction Controlling Warsaw Convention and Transportation Contract Thereunder.

For purposes of properly construing and fairly ascertaining the sense and meaning of the pertinent provisos of the Warsaw Convention and the transportation contract, (R. 62-68) and determining the true legal effect of Subdivision (1) of Article 22 thereof, resort should be had to the following illuminating cardinal canons of construction.

1. A treaty or convention of the United States, combining as it does the characteristics of an ordinary contract and federal statute, must be construed in the light of the established principles of construction applicable to private contracts and statutes generally.

   Tucker v. *Alexandroff,* 183 U. S. 424, 437;
   Hamilton v. *Erie R.R. Co.,* 219 N. Y. 343, 353;
   Re: *Zalewsky,* 292 N. Y. 332, 336-337;
   Wright v. *Henkel,* 190 U. S. 40, 57;
   U. S. v. *Seufert, etc.,* 233 Fed. 579, 582 (U. S. D. C. Oregon) affd. in 249 U. S. 194;
   Re: *Clerkship of Circuit Court,* 90 Fed. 248, 251, 252.

2. A treaty or convention of the United States must be very fairly and liberally construed, *without the sacrifice of individual rights* and principles of personal liberties, whenever this can be done, in effectuating its true intent and purpose.

   Tucker v. *Alexandroff,* 183 U. S. 424, 437;
   Re: *Zalewsky,* 292 N. Y. 332, 336, 339 (April 1944);
   Hamilton v. *Erie R.R. Co.,* 219 N. Y. 343, 353-354.

3. Whenever it is reasonably possible to do so, a treaty or convention of the United States *must be so interpreted as not to override state laws and principles of public policy or impair private rights* under them. The courts should liberally favor a construction of a

treaty or convention *which is in harmony with existing law, federal and state, on the same general subject.*

Guaranty Trust Co. v. *U. S.*, 304 U. S. 126, 143, and leading authorities therein cited;
Re: Zalewsky, 292 N. Y. 332, 339 (April, 1944);
Missouri Pac. R.R. Co. v. *Boone*, 270 U. S. 466, 472;
Re: Clerkship of Circuit Court, 90 Fed. 248, 251-252;
The Cleveland, etc. v. *Blind*, 182 Ind. 398, 424, 105 N. E. 483;
59 *C. J.* 1009;
50 *Am. Jur.* 376, §370; id. 332-336, §339, *et seq.;*
2 Bouvier (Rawle's Revis.) 348;
3 *Sutherland's Statutory Construction*, (3rd Ed. 1943) p. 125, §5901, pp. 130-131, §5903.

4. The intent of the parties to a contract and the general design, purpose, spirit and reason of such contract and its distinct parts are controlling considerations in its interpretation.

Tucker v. *Alexandroff*, 183 U. S. 424, 437;
U. S. v. *Seufert, etc.*, 233 Fed. 579, 582, affd. in 249 U. S. 194;
12 Am. Jur. 772-777;
Williston on Contracts (1936 Revised Ed.), Vol. 3, §618, pp. 1779-1780;
Collins v. *Central Trust Co.*, 133 Misc. 93, 94 (1928), affd. in 229 A. D. 747, affd. in 255 N. Y. 590;
Hamilton v. *Erie R.R. Co.*, 219 N. Y. 343, 353.

5. Accordingly, such contract must be read as a whole, that is to say, every part thereof must be considered and accorded a sensible and fair operation consistent with the general design and object of the whole instrument, so that no clause or sentence therein shall be rendered superfluous, insignificant, or absurd.

U. S. v. *Seufert, etc.*, 233 Fed. 579, 582, affd. in 249 U. S. 194;
Sullivan v. *Kidd et al.*, 254 U. S. 433, 439;
Broom's Legal Maxims (Tenth Ed. 1939) pp. 394, 389-391;
Lau ow Bew v. *U. S.*, 144 U. S. 47, 59;
U. S. v. *Gue Lim*, 176 U. S. 459, 467;
Hamilton v. *Erie R.R.*, 219 N. Y. 343, 353-354;
50 *Am. Jur.* 385, §377.

6. Accordingly, broad, confusing, or contradictory terms and expressions must be harmonized, if reasonably possible, as justice and equity may require so as to give effect to the main objects and general intendment of the instrument *in conformity with established principles of existing law,* and toward such end whenever justice and equity should make it reasonably necessary, *ordinary words will be given a restricted or special signification and application.*

12 *Am. Jur.* 772-775; 50 id. 372-379, §368, *et seq.;*
Williston on Contracts (1936 Rev. Ed.) Vol. 3, §618, p. 1779;
Broom's Legal Maxims (1939, Tenth Ed.) pp. 389-390, 394;
U. S. v. *D. & H. Co.*, 213 U. S. 366, 412;
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Atwater & Co. v. *Panama R.R. Co.*, 246 N. Y. 519, 524;
Collins v. *Central Trust Co.*, 133 Misc. 93, 94, affd. in 229 A. D. 747, affd. in 255 N. Y. 590;
3 *Sutherland's Statutory Construction* (3rd Ed. 1943) pp. 130-131, §5903.

7. It is an established maxim that a legislative act or treaty which *is based or adopted for the benefit of a distinct class of business adventurers acting as com-*

mon carriers, must, when ambiguous, be construed *most strongly against such business adventurers and most liberally in favor of the general public.*

Broom's Legal Maxims (10th Ed. 1939), p. 408, and various leading authorities therein cited, including the following:

Stowbridge Canal Co. v. *Wheeley,* 2 B. & Ad. 792;
Priestly v. *Foulds,* 2 Scott N. R. 205, 228;
Gildart v. *Gladstone,* 11 East 675, 685;
Ribble Nav. Co. v. *Hargreaves,* 17 C. B. 385, 402;
Ware v. *Regent's Canal Co.,* 28 L. J. Ch. 153, 157.

8. A stipulation in any instrument or contract regarding limitations of a common carrier's liability for negligence not being favored by the law, must be clear and unmistakable; and, if ambiguous, will be very strictly and most strongly construed against the common carrier and most liberally in favor of those damnified.

10 Am. Jur. 121, §1149;
N. J. Steam Navig. Co. v. *Merchants Bank,* 6 How. (47 U. S.) 344, 382-384;
N. Y. C. R.R. Co. v. *Lockwood,* 17 Wall (84 U. S.) 357, 367, 374;
Galloway v. *Erie R. R. Co.,* 116 A. D. 777, 779 (2nd Dept.) affd. in 192 N. Y. 545.

Appendix B.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. .....

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

Petitioners' Statistical Data on Aviational Progress During Past Twenty-six Year Period and Specific Years Thereof*

*This Appellate Court may, of course, take judicial notice of such scientific developments and historical facts. *Brown* v. *Piper*, 1 Otto (91 U. S.) 37-44; *Hesse* v. *Rath* (1928) 224 A. D. 344, 345, 230 N. Y. S. 676, affd. in 249 N. Y. 436, 438; *Thrasher* v. *City of Atlanta et al.*, 178 Ga. 514, 517 (1933); *McCusker* v. *Curtiss Wright Flying Service, Inc.*, 269 Ill. App. 502, 527 (1923).

Petitioners' Statistical Data on Aviational Progress During Past Twenty-six Year Period and Specific Years Thereof.

The World Almanic for 1942 at page 277 thus stresses aviation gains in the United States in the year 1941:

> "The 16 scheduled airline operators in the United States carried 3,423,454 passengers during the fiscal year ended June 30, 1941, as compared with 2,368,196 for the previous year. * * * During the fiscal year 121,083,634 miles were flown.
>
> " * * * The domestic airlines carried 3,145,970 revenue passengers during the fiscal year and revenue passenger miles were 1,174,835,025."

This same World Almanac, at page 280, also indicates that in the year 1940, alone, 3,185,278 passengers were carried by air carriers operating domestic and foreign service transportation airplanes, for a total of 1,265,164,059 passenger miles (*i. e.*, at rate of one passenger per mile). And, in this connection, it is stated at page 279 that the safety record for 1940 was 36,127,618 passenger air miles flown per passenger fatality.

Encyclopedia Britannica, Vol. 2 (1942 Ed.), at pages 804-805, states:

> "The air service of the world in the two decades following the World War of 1914-18 progressed so steadily that by 1939 all continents were covered by extensive airline networks, practically every major ocean route was paralleled by at least one air-line service and even the Arctic regions had yielded to substantial experimentation looking toward the eventual establishment of transpolar air services."

In a statistical table the last cited reference work, sets forth the following information on air mileage flown around the world from 1919 to 1939, inclusive (see pp. 804-805, *supra*):

Year	*Mileage Flown*
1919	1,022,000
1920	2,969,000
1921	5,831,000
1922	5,666,000
1923	6,570,000
1924	8,764,000
1925	13,011,000
1926	16,824,000
1927	22,242,000
1928	34,005,000
1929	53,379,000
1930	69,505,000
1931	83,500,000
1932	90,372,000
1933	100,580,000
1934	103,432,000
1935	149,442,000
1936	179,243,000
1937	198,868,000
1938	233,756,000
1939	300,000,000

In air Commerce Bulletin, Vol. 9, No. 11, dated May 15th, 1938, published and issued by the Bureau of Air Commerce of the United States Department of Commerce, the following interesting statistics are given. In 1930 a total of 417,505 passengers was flown for a total of 103,-747,249 passenger air miles traversed (*i. e.*, at the rate of a passenger per mile); and this was done with a safety record of 4,322,802 passenger air miles traversed per passenger fatality.

In a subsequent Air Commerce Bulletin, issued by the Federal Civil Aeronautics Administration in 1942, these statistics are given. In 1941, a total of 4,380,610 passengers was flown for a total of 1,676,949,226 passenger air miles traversed; and this was done with a safety record of 45,322,952 passenger air miles traversed per passenger fatality.

The 1946 Encyclopedia Britannica Book of the Year, commenting on the general progress of aviation during the year of 1945, states (pp. 92-93):

"• • • During the first 11 months of 1945 U. S. carriers in contract services flew 100,544,961 transport miles, 1,751,763,336 passenger miles and 399,928,428 tons miles. With the completion of the major part of the direct war operations in the early part of 1945 it was revealed that in the course of those operations the air lines had flown 8,000,000,000 passenger miles and 850,000,000 cargo ton miles. The distance travelled was the equivalent of 26,000 trips around the globe of the equator.

• • • • •

"International Air Transport—

"During 1945 U. S. flag lines carried approximately 460,000 revenue passengers for an estimated 493,000,000 revenue passenger miles on their international routes. Revenue miles flown were estimated at 32,000,000 and ton miles of mail and cargo were 4,625,000 and 8,336,000 respectively.

"The pattern of postwar operations emerged when three air lines, Pan American Airways, American Airlines, Overseas and Transcontinental and Western Air, were authorized to fly the Atlantic in scheduled commercial service. Operation of those routes was to link the United States by air with the principal centres of Europe, North Africa, the Middle East and India. The Atlantic extensions raised the total international certificate route mileage of U. S. carriers to approximately 106,000 as compared with 57,804 in 1940.

"By the end of 1945 P.A.A. and A.A.O. were operating daily flights each way between the U. S. and the British Isles and plans were underway for a steady extension of service over the entire length of the routes. • • •"

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IN THE

Supreme Court of the United States

October Term, 1949

No. 602

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1949

No. 602

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

Petitioners, who are the next-of-kin of Arthur Alburtus Lee, deceased, seek to have this Court review an order of the New York Court of Appeals entered on the 23rd day of November, 1949 (R. p. 152) upon the remittitur of the Appellate Division, Second Department, and the final judgment entered (R. p. 154) upon such final order and remittitur on the 12th day of December, 1949, in the office of the Clerk of the Supreme Court of the State of New York, in the County of Westchester.

Petitioners, who are plaintiffs herein, initially moved at the Special Term of the Supreme Court, Westchester County, New York, to strike out the Third and Fourth

affirmative defenses of the defendant's answer, among others, on the ground of insufficiency of law. This motion was denied by an order entered on July 14, 1947, in the office of the Clerk of Westchester County (R. pp. 43, 44). Subsequently, defendant moved for an order granting judgment on the pleadings, striking out so much of plaintiffs' claim for damages against the defendant as exceeds the sum of $8,291.87. This motion was granted by Mr. Justice FLANNERY by an order entered on December 19, 1947 (R. pp. 8, 9). Both the above orders and the judgment were unanimously affirmed by the Appellate Division, Second Department (R. pp. 81, 82; 275 App. Div. 855, Case No. 1). The remittitur of the Appellate Division and the judgment of affirmance (R. pp. 139, 140) were filed in the office of the Clerk, Westchester County, on June 2, 1949.

Then petitioners moved the Appellate Division, Second Department, for an order granting them leave to appeal to the New York Court of Appeals. Such motion was denied on the 28th day of June, 1949 (R. pp. 121, 122; 275 App. Div. 962, Case No. 2). Thereupon, petitioners applied to the New York Court of Appeals for leave to appeal to that Court, and on November 23, 1949, the New York Court of Appeals denied leave to appeal (R. p. 152; 300 N. Y. 545). Judgment was entered upon such order of the Court of Appeals and upon the aforementioned remittitur on the 12th day of December, 1949 (R. p. 154), in the office of the Clerk of Westchester County.

Opinions Below.

There were no opinions issued by the courts below. Mr. Justice J. GORDON FLANNERY in rendering his decision in the Special Term, Supreme Court, Westchester County, denying plaintiffs' motion to strike the Third and Fourth

affirmative defenses cited "*Garcia* v. *Pan American Airways*, 269 App. Div. 287, 292, aff'd 295 N. Y. 852" (R. p. 70).

The Facts and the Pleadings.

The complaint (R. pp. 51-59) alleges that the plaintiffs are the next-of-kin of Arthur Alburtus Lee, deceased, and bring the present action for the alleged wrongful death of the decedent in the accident involving defendant's aircraft Yankee Clipper near Lisbon, Portugal, on February 22, 1943. The decedent was riding as a passenger in said airplane, which was proceeding in flight across the Atlantic Ocean from New York City to an airport in Lisbon, Portugal. Decedent was killed when the airplane crashed into the Tagus River in the landing area of the airport at Lisbon.

The answer (R. pp. 60-69) denies the allegations of negligence contained in the complaint and asserts four separate and complete defenses and two separate and partial defenses. The third separate and partial defense alleges that at the time the decedent met his death he was being transported under a contract of transportation wherein the place of departure and the place of destination were within the United States and there were agreed stopping places at Lisbon, Portugal, United Kingdom of Great Britain and Northern Ireland and Natal, Brazil; that said transportation was international transportation within and subject to the Convention for the Unification of Certain Rules Relating to International Transportation by Air and Additional Protocol, signed at Warsaw October 12, 1929 (commonly known as the Warsaw Convention), said Convention having been adhered to on behalf of the United States in accordance with the proclamation of the President dated October 29, 1934 (49 Stat., pt. 2, at p. 3000), as advised by the Senate of the United States. It is further alleged that the said

transportation and the rights of the parties were and are governed by and subject tc the provisions of the said Convention, the conditions and requirements of which were in all respects duly complied with by defendant, and defendant claims limitation of liability in accordance with the provisions of Articles 17 and 24 of the Convention.

For a fourth separate and partial defense the answer recites at length the terms of the contract between the decedent and the defendant which were contained in the passenger ticket issued to the decedent for the transportation in question. It is alleged that in accordance with the said agreement the rights of the parties herein were and are governed by and subject to the rules relating to liability established by the said Warsaw Convention, the conditions and requirements of which were in all respects duly complied with by the defendant, and defendant claims limitation of liability in accordance with the rules relating to liability for death established by said Convention.

By stipulations dated September 19, 1944 and July 3, 1947, respectively (R. pp. 20-23; 48, 49), defendant admitted its liability to plaintiffs as surviving widow and next-of-kin of the decedent and that the damages in consequence thereof substantially exceeded the sum of $8,291.87. This admission of defendant, however, was made without prejudice to its contention that its liability is limited to the sum of $8,291.87 as alleged in its third and fourth partial affirmative defenses; and it was further stipulated that such admissions shall have no force and effect and shall be inadmissible for any purpose in the event that the matters alleged in the third and fourth separate partial affirmative defenses shall be stricken as insufficient in law or for any other reason.

In the aforesaid stipulations plaintiffs admitted the allegations contained in paragraphs Fifth and Sixth of de-

fendant's answer which state that on or about February 19, 1943, the decedent and the defendant entered into a contract for the transportation of said decedent by defendant and that in the course of said transportation the decedent met his death; and that said contract of transportation was evidenced by a ticket in writing which contained, among other things (R. p. 64), the following provision:

> "Transportation under the annexed Flight Coupon(s) is subject to the rules relating to liability established by the Convention of Warsaw the 12th of October 1929."

The Warsaw Convention.

The Warsaw Convention was originally signed by the representatives of twenty-three nations at Warsaw, Poland, on October 12, 1929. It is an international treaty, regulating and limiting the rights and responsibility of carriers by air in international transporation of passengers and property. The Convention, after it came into force, was left open for adherence by any State (Art. 38). The United States adhered to the Convention by proclamation of the President, dated October 29, 1934, as advised by the Senate June 15, 1934. The original text of the convention which is in French is contained in Statutes-at-Large, volume 49, Part 2, pages 3000, *et seq.* It has been ratified or adhered to by thirty-eight nations, including all or substantially all of the leading commercial nations of the world. Portugal, although not an adherent at the time of the accident, subsequently adhered to the treaty on March 20, 1947. See *United States Aviation Reports,* September and December, 1949, Treaty Data; and *A List of Treaties and Other International Acts of the United States in Force on December 31, 1941,* Department of States Publication No. 2103 (1944).

The Convention applies to all international transportation of persons, baggage, or goods performed by aircraft for hire (Art. 1). International transportation is defined in Article 1, clause (2), as:

> "any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. * * *"

The carrier is presumptively liable for death or injury to passengers (Art. 17) and for loss of or damage to property (Art. 18), but is entitled to a limitation of its liability to certain specified amounts (Art. 22). The Convention further provides (Art. 25) that the carrier shall not be entitled to the benefit of the provisions excluding or limiting liability if the damage is caused by wilful misconduct on the part of the carrier or its agents.

In recommending the adherence of this country to the Convention, Secretary of State Hull in his report to the President declared (Senate Document, Executive G, 73rd Cong. 2nd Sess.):

> "This Convention has been studied by the Department of Commerce, which advises adherence thereto by the Government of the United States. That Department has expressed the view that the provisions of the Convention are fair and afford protection to the air-transport operator as well as to passengers and shippers, and that if the United States fails to become a party to the Convention

American air-transport lines operating on an international basis will be at a disadvantage while operating in countries that are parties to the Convention."

POINT I.

The validity and constitutionality of the Warsaw Convention has been upheld by every court that has had the Convention before it and this Court has heretofore declined to review final judgments in actions for wrongful death limiting the amount of recovery under the Warsaw Convention. *Wyman* v. *Pan American Airways, Inc.*, 324 U. S. 882; *Garcia* v. *Pan American Airways, Inc.*, 338 U. S. 824.

The constitutionality of the Warsaw Convention has been sustained by every court which has had the Convention before it.

Wyman v. *Pan American Airways, Inc.*, 181 Misc. 963, 267 App. Div. 947, 293 N. Y. 878, cert. den. 324 U. S. 882;

Garcia v. *Pan American Airways, Inc.*, 269 App. Div. 287, affd. 295 N. Y. 852; cert. den. for want of a final judgment 329 U. S. 741; cert. den. finally 338 U. S. 824;

Ross v. *Pan American Airways, Inc.*, 299 N. Y. 88, 85 N. E. (2d) 880;

Indemnity Insurance Company of North America v. *Pan American Airways, Inc.*, 58 F. Supp. 338.

In the *Wyman* case above, which this Court refused to review, petitioners were the executors of a passenger en

route from San Francisco to Hong Kong on the aircraft "Hawaii Clipper", who lost his life when the aircraft disappeared in flight between Guam and Manila, P. I. The case was tried in the New York Supreme Court and following the conclusion of the trial, the Court directed judgment for the plaintiffs in the amount prescribed by the Convention, declaring (181 Misc. at pp. 964-965):

> "The rights of the parties are fixed by the rules for 'International Air Transportation' established and concluded at Warsaw, Poland, on October 12, 1929, at a convention of nearly all governments, including the United States. Final adherence to this international treaty on the part of the United States was proclaimed by the President on October 29, 1934 (49 U. S. Stat. 3000), which thus becomes part of the law of the land (U. S. Const., art. VI; *United States* v. *Belmont*, 301 U. S. 324), superseding State Law (*Moscow Fire Ins. Co.* v. *Bank of New York*, 280 N. Y. 286; *Conklin* v. *Canadian-Colonial Airways*, 266 N. Y. 244). The said rules were made a condition of the ticket herein (*Murray* v. *Cunard Steamship Co. Ltd.*, 235 N. Y. 162) and in any event are so made under the rules themselves (art. 3, subd. 2).
>
> The Warsaw Convention rules are applicable only to international flights (art. 1) and raise a presumption of liability on the part of the carrier for injury or death to a passenger (arts. 17, 20) limited to 125,000 francs or approximately $8,300 under the rate of exchange fixed (art. 22) except where the carrier is guilty of 'wilful misconduct' (art. 25)."

This decision was affirmed unanimously without opinion both by the Appellate Division, First Department, 267 App. Div. 947, and the Court of Appeals, 293 N. Y. 878. This Court denied certiorari, 324 U. S. 882.

In *Garcia, et al.* v. *Pan American Airways, Inc., supra,* plaintiffs' decedent was a passenger on the Yankee Clipper

and lost his life in the same accident with which the present case is concerned. The defenses pleaded in that case were substantially identical to the third and fourth defenses here involved. The plaintiffs moved to dismiss them on the ground, *inter alia*, that the Convention is unconstitutional and argued and briefed the point at great length, both at Special Term and in the appellate courts. Mr. Justice COYNE denied the motion and expressly upheld the constitutionality of the Convention. Both the Appellate Division and the Court of Appeals unanimously affirmed, and this Court has denied certiorari. Subsequently, defendant moved for summary judgment in favor of plaintiffs and limiting plaintiffs' claim to $8,291.87. This motion was granted by the Supreme Court, Westchester County, and the Appellate Division, Second Department affirmed. The Court of Appeals denied leave to appeal and this Court denied certiorari on October 10, 1949.

The validity of the Warsaw Convention has also been upheld by a federal court in the case of *Indemnity Insurance Company of North America* v. *Pan American Airways, Inc.*, above. This latter case which also arose out of the same accident was an action in the United States District Court for the Southern District of New York. The second and third defenses in that case were again substantially identical to the third and fourth defenses in the case at bar. Plaintiff's motion to dismiss the defenses was denied in all respects by Judge RIFKIND who held (1) that the Warsaw Convention is constitutional, (2) that it is self-executing and its provisions govern the rights of parties in international air transportation as a matter of law and (3) that since the Convention is valid and operative, the defense based upon the contract of transportation incorporating the terms of the Convention is likewise sufficient in law.

These decisions not only do not conflict with each other but are fully in accord with established principles governing the application and effect of treaties to which the United States has become a party.

U. S. Constitution, Article VI, Clause 2;

Foster v. *Neilson*, 2 Peters (27 U. S.) 253, 314;

U. S. v. *Rauscher*, 119 U. S. 407, 417-418;

Dainese v. *Hale*, 91 U. S. 13, 18-19;

Asakura v. *Seattle*, 265 U. S. 332, 341;

Valentine v. *U. S. ex rel. Neidecker*, 299 U. S. 5, 10;

Bacardi Corp. v. *Domenech*, 311 U. S. 150, 161.

On page 12 of the petition, plaintiffs have set forth their arguments herein. In summary, these are:

I. The Warsaw Convention is void and unenforceable because it contravenes the Seventh Amendment of the Constitution of the United States;

II. Accordingly, the transportation contract being "infected at its core" with the unconstitutionality of the Warsaw Convention is likewise void and unenforceable;

III. The provisions of the Warsaw Convention are "fatally general, vaguely broad, ambiguous and uncertain".

As pointed out above, the courts in every case have upheld the validity and constitutionality of the Convention and in two of those cases certiorari has been denied by this Court. The plaintiffs, in arguing that the questions presented by this petition are novel and of first impression, thereby disregard the recent decisions as set forth above and the refusals of this Court to review those decisions.

If the Warsaw Convention violates the Seventh Amendment, it did so in the cases above cited, just as much as in the instant case. Petitioners indicate on page 13 of their petition that defendant's counsel conceded in oral argument before a Special Term in the Supreme Court, Westchester County, that the questions presented by defendant were novel. Actually defendant's position was and is that the questions were *not* novel and that the plaintiffs have merely advanced different arguments to attack questions already exhaustively argued by counsel and decided by the courts. The fact that appellants may be presenting a different *argument* as to unconstitutionality does not make the question a novel one or justify asking this Court to reverse its prior position. It is obvious that the question of the constitutionality and validity of the Warsaw Convention has been thoroughly considered by the courts and there is no conflict in the decisions which have unanimously upheld the Convention.

Plaintiffs' arguments that the liability and limitation provisions of the Convention are fatally general, vaguely broad, ambiguous and uncertain are also disposed of by the decisions above. Furthermore, as demonstrated under Point V of this brief, these claims are both unsupported and irrelevant.

POINT II.

The question presented by the petition is a moot one in this case as the Seventh Amendment applies (a) only to the Federal courts and (b) to suits at common law.

In addition to the decisions set forth above, plaintiffs are confronted with further difficulties. The first of these is that the Seventh Amendment has no application to State courts. This has been clearly established by a number of cases. See, for example:

Minneapolis & St. Louis R. R. Co. v. *Bombolis*, 241 U. S. 211, 220:

> "* * * the limitations of the [Seventh] Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and * * * its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States. And of course it is apparent that to apply the constitutional provision to a condition to which it is not applicable would be not to interpret and enforce the Constitution, but to distort and destroy it."

McElvaine v. *Brush*, 142 U. S. 155, 158:

> "The first ten articles of amendment were not intended to limit the powers of the States in respect of their own people, but to operate on the Federal government only; * * *."

See, also:

Justices v. *Murray*, 9 Wall. 274;

Middleton v. *Whitridge*, 213 N. Y. 499;

In re Newcomb, 18 New York Supplement 16 (not officially reported).

Thus, even if the Warsaw Convention should be held to deprive the plaintiffs of a jury trial in the State courts, its constitutionality cannot be assailed upon that ground. So far as the Federal courts are concerned, it has already been noted that the United States District Court sustained the validity of the Convention in *Indemnity Insurance Co. of North America* v. *Pan American Airways, Inc.*, 58 F. Supp. 338 (S. D. N. Y.).

Secondly, it is quite clear that the present action is not a suit at common law within the meaning of the Seventh Amendment.

The plaintiffs are endeavoring in this action to enforce a right alleged in paragraphs Tenth, Eleventh and Twelfth of the complaint (R. pp. 54-56) to arise under the statutes and laws of Portugal. Portugal is a civil and not a common law country. Their cause of action is based on and springs from the civil and not the common law.

As the New York Court of Appeals pointed out in *McConnell* v. *Caribbean Petroleum Co.*, 278 N. Y. 189, 193, where the plaintiff sued for personal injuiries sustained in Venezuela:

> "* * * Venezuela, being a civil law country, the common law, of course, is inoperative. Whatever rights plaintiff may possess depend upon article 1218 or article 1683 of the Venezuela Civil Code. Both rights are created by statute."

Plaintiffs state on page 34 of their brief that the law of Portugal, which gives rise to plaintiffs' claim for damages for the wrongful death of decedent, "is but an incidental fact in the transaction" and the rights of plaintiffs are enforced "by means of a remedy springing directly from the local common law". These statements are, of course, wholly erroneous. It has been clearly decided by the courts of New

York that no action will lie by virtue of the law of New York for a wrong committed outside of that State which resulted in death.

Whitford v. *Panama R. Co.*, 23 N. Y. 465;

Loucks v. *Standard Oil Co.*, 224 N. Y. 99;

Wikoff v. *Hirschel*, 258 N. Y. 28, 179 N. E. 249;

Baldwin v. *Powell*, 294 N. Y. 130, 161 N. E. 412; reh. den. 294 N. Y. 840, 62 N. E. (2d) 393.

See also:

Hunter v. *Derby Foods, Inc.*, 110 F. (2d) 970 (C. C. A. 2d);

Maynard v. *Eastern Airlines, Inc.*, 178 F. (2d) 139 (C. C. A. 2d).

On this point this Court, in *Baldwin* v. *Powell, supra,* said (p. 132):

> "The Decedent Estate Law [§ 130] • • • applies only to actions brought for damages for a wrong committed here causing the death of a person [citing cases]. A right of action for the death of a person which is created by another state where the wrong causing death was committed, may ordinarily be enforced in this forum even though the remedy provided in the statute creating the right of action may be different from the remedy provided in the death statute in New York."

Furthermore, no right of action has ever existed at common law to recover damages for wrongful death. No such right of action in any form existed either in England

or in this country at the time of the adoption of the Constitution. It was not until the passage in 1846 of Lord Campbell's Act that a statutory right of action for wrongful death was created in England. The right of action was first created in this country—a purely statutory cause of action—by the passage of a wrongful death statute in the State of New York in 1847.

Thus, in the *Wyman* case, *supra,* the Court said at page 965:

> "The right to bring a death action is purely statutory. It did not exist at common law (*Debevoise* v. *N. Y., L. E. & W. R.R. Co.,* 98 N. Y. 377) and depends upon the existence of a statute creating a right of action at the place where the 'force impinged' causing injuries and death (*Whitford* v. *Panama R. R. Co.,* 23 N. Y. 465; *Kristansen* v. *Steinfeldt,* 165 Misc. 575, revd. on other grounds 256 App. Div. 824)."

See also:

> *Maynard* v. *Eastern Airlines, Inc.,* 178 F. (2d) 139, 140 (C. C. A. 2d).

The Seventh Amendment merely preserves the right to jury trial where such right existed at the time the Constitution was adopted; it does not apply to remedies created subsequently. As stated in *Simmons* v. *U. S.,* 29 F. Supp. 285 (at pp. 286-287):

> "The constitutional right to a trial by jury applies to those cases in which the right existed at common law or was provided for by statute at the time the Constitution was adopted. It is not applicable to causes arising in equity or to civil cases of admiralty or maritime jurisdiction *or to remedies subsequently provided for by statute and which did not previously exist.*" (Italics ours.)

Nor is there any merit in the argument that the right of action for wrongful death has now become generally recog-

nized and, therefore, should be protected by the Seventh Amendment, notwithstanding the fact that the right of action did not exist when the amendment was adopted. In *Dimick* v. *Schiedt*, 293 U. S. 474, this Court declared (p. 487):

> "It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. *Funk* v. *United States*, 290 U. S. 371. *But here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution.* The distinction is fundamental, and has been clearly pointed out by Judge Cooley in 1 Const. Limitations, 8th ed., 124." (Italics ours.)

The plaintiffs on page 34 of their brief argue that "the courts have in principle upheld the constitutional substantive right of trial by jury specifically under the Seventh Amendment in statutory actions for the recovery of damages for wrongful death" and cite *Robostelli* v. *New York, New Haven & Hartford R. Co.*, 33 F. 796, 801, and *Diederich, et al.* v. *American News Company*, 128 F. (2d) 144, 145-146. In neither of these cases was the question of the right to a jury trial at issue or decided. We know of no case which supports the appellants' contention.

Finally, the Seventh Amendment does not guarantee a jury trial in all actions at common law but only those at

common law where it existed at the time of passage of the amendment. In *United States* v. *243.22 Acres of Land,* 41 F. Supp. 805, aff'd 129 F. (2d) 678, cert. den. *Lambert* v. *U. S.,* 317 U. S. 698, 63 S. Ct. 441, the Court said (p. 806):

> "The earlier decisions apparently rest on the conclusion that since a condemnation proceeding is an action at law, it therefore falls within the orbit of the Seventh Amendment which preserves the right of trial by jury 'in suits at common law'. *The fallacy in this reasoning lies in the fact that the Seventh Amendment did not make a jury trial a matter of right in every suit at common law, but merely preserves it where it already existed.* History records no regular practice of granting jury trials in condemnation proceedings in English or early American common law (see United States v. Certain Lands in Town of Hempstead, supra), so that the mere entitling of a condemnation proceeding as an action at law is not the pass key to the area wherein lies the right to a jury trial. In fact, it might be said that if most of the earlier cases be carefully examined, few, if any, really presented the clear cut issue of the right to a jury trial." (Italics ours.)

See, also:

> *Welch* v. *T. V. A.* and *Lewis* v. *T. V. A.,* 108 F. (2d) 95, cert. den. 309 U. S. 688, 89 L. Ed. 1030, 60 S. Ct. 889.

Therefore, in view of the foregoing, it appears that plaintiffs are urging this Court to decide a purely moot question. As pointed out in the decisions above, a denial of the right of jury trial in the State courts is not a violation of the Seventh Amendment and this action is not a suit at common law within the meaning of that amendment. Consequently, the plaintiffs are by their petition asking this Court to determine whether, if this case had been brought in

the Federal instead of the State court and if it had been an action at common law instead of a statutory action for wrongful death arising under Civil Code of Portugal, the defenses founded upon the Warsaw Convention would have been invalid under the Seventh Amendment to the Constitution—obviously a purely moot question.

POINT III.

Since the decision of the Appellate Division of the New York Supreme Court may have been either on a state ground or on a federal ground, and the state ground is sufficient to sustain the judgment, this Court should not undertake to review the decision.

As set forth in the statement herein, petitioners initially moved to strike the third and fourth affirmative defenses of the defendant's answer. The third defense pleads a limitation of liability in accordance with the provisions of the Warsaw Convention. The fourth defense pleads a limitation of liability in accordance with the terms of the contract between the decedent and the defendant.

The Supreme Court, Westchester County, denied plaintiffs' motion to strike out *both* defenses and subsequently granted defendant's motion for a verdict in favor of the plaintiffs for the limited sum and striking out so much of plaintiffs' claim as exceeded that sum. This decision was subsequently affirmed by the Appellate Division and leave to appeal was denied by the New York Court of Appeals. There were no opinions rendered by any of these courts. Therefore, it does not appear whether their decision rested upon the constitutionality of the Warsaw Convention pleaded in the third defense or upon the limitation of liability as a matter of contract under New York State law as set forth in the fourth defense.

There is, in addition, a second state ground independent of any Federal question upon which the courts of the State of New York may have rested their decision. This is that the decedent in the transportation contract waived his right to a jury trial. This point was raised by defendant and argued and briefed at length in all of the courts below.

The plaintiffs themselves recognize that the decisions of the lower courts may have been based on those purely state grounds because they argue at some length in Points II and III of their brief against the validity of the contract limitation and the existence of any waiver.

It has been well established by the decisions of this Court that if it does not appear on which of two or more grounds the State Court judgment was based, and the grounds independent of a Federal question are sufficient in themselves to sustain it, this Court will not take jurisdiction.

Klinger v. *Missouri*, 13 Wall. 257, 263;

Wood Mowing and Reaping Machine Co. v. *Skinner*, 139 U. S. 293, 297;

Allen v. *Arguimbau*, 198 U. S. 149, 154-155;

Lynch v. *New York*, 293 U. S. 52, 54-55.

See also:

Williams v. *Kaiser*, 323 U. S. 471, 477.

In stating this principle, in *Lynch* v. *New York*, *supra*, this Court said at page 54:

> "* * * The Court of Appeals of the State affirmed the order of the Appellate Division, but without opinion, 263 N. Y. 533; 189 N. E. 684, and the grounds of its decision are left to conjecture. It may be sur-

mised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.

It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (Citing authorities.) *Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it,* this Court will not take jurisdiction. *Allen* v. *Arguimbau,* 198 U. S. 149, 154, 155; *Johnson* v. *Risk, supra; Wood Mowing & Reaping Machine Co.* v. *Skinner, supra; Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.,* 228 U. S. 596, 599; *Cuyahoga River Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 302, 304." (Italics ours.)

It is obvious here that either of the two state grounds, *i. e.,* limitation of liability by contract or waiver by contract, are substantial and sufficient in themselves to sustain the decisions of the New York State courts. As set forth on pages 4 and 5 of this brief, plaintiffs have admitted that the decedent and defendant entered into a contract for the

transportation of decedent and that said contract contained a clause limiting liability of the defendant in accordance with the terms of the Warsaw Convention. Since the courts of the State of New York refused to strike the fourth affirmative defense based on this contract, it is possible that they decided that under the law of the State of New York defendant's liability was limited in accordance with this contract.

Moreover, the New York courts may have decided that under this contract provision the decedent waived the right to a jury trial in respect to any claim in excess of the treaty limit. The Appellate Division of the Supreme Court of New York has held in at least three cases (*Zeesell Realty Co., Inc.* v. *Cunningham,* 215 App. Div. 811; *Waterside Holding Corporation* v. *Lask,* 233 App. Div. 456, and *Lera Realty Co.* v. *Rich,* 273 App. Div. 913) that a provision in a lease, waiving in advance a jury trial in the event of litigation between landlord and tenant, is valid and enforceable. We see no distinction to be drawn, in this regard, between a lease and a contract of transportation and it certainly cannot be assumed that the Appellate Division in this case did not follow its previous decisions above cited.

In this connection, it has been consistently stated that the right to trial by jury guaranteed by the Seventh Amendment may be waived by a party.

> *Barney* v. *Schneider,* 76 U. S. 248, 9 Wall. 248, 19 L. Ed. 648;
>
> *City of Richmond* v. *Smith,* 82 U. S. 429, 15 Wall. 429, 21 L. Ed. 280;
>
> *Hodges* v. *Easton,* 106 U. S. 408, 1 S. Ct. 307, 27 L. Ed. 169.

And it has been further held that the constitutional right to a trial by jury guaranteed by the Seventh Amendment is a mere privilege and may be waived by conduct inconsistent with the apparent expectation of insisting on it.

Maytag v. *Meadows Mfg. Co.*, 45 F. (2d) 299, cert. den. 283 U. S. 843, 51 S. Ct. 489, 75 L. Ed. 1952.

POINT IV.

The Warsaw Convention does not deprive the plaintiffs of their right to trial by jury.

Even assuming the correctness of plaintiffs' position that the Seventh Amendment is applicable and that the New York courts based their decision solely on the Federal question, their claims are without merit. The plaintiffs argue that because the Convention limits the liability of the defendant to $8,291.87, it fails to "preserve" their right to a trial by jury of the question as to the amount of their damages in excess of said sum.

Substantially the same argument was made against the constitutionality of the Workmen's Compensation and Federal Employers' Liability Laws. It was claimed that the Workmen's Compensation Laws deprived employers and employees of their constitutional right to a trial by jury of the question of the amount of damages suffered by employees in accidents caused by the employers' fault. This Court in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, in upholding the constitutionality of the Workmen's Compensation Law of the State of Washington, disposed of the claim of violation of the Seventh Amendment with the statement (p. 235):

> "The Seventh Amendment, with its provision for preserving the right of trial by jury, is invoked. * * *

> So far as private rights of action are preserved, * * * we find nothing in the act that excludes a trial by jury. As between employee and employer, the act abolishes all right of recovery in ordinary cases, and therefore leaves nothing to be tried by jury."

See, also, *New York Central R. R. Co.* v. *White*, 243 U. S. 188, upholding the constitutionality of the Workmen's Compensation Law of New York, in which the Court said (at pp. 197-198, 201):

> "The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is of course recognized. But those rules, as guides of conduct, are not beyond alteration by legislation in the public interest. *No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.* (Italics ours.)
>
> * * * * * *
>
> * * * If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary."

In like manner, under the Warsaw Convention, to paraphrase the above, if the airline passenger and his dependents are no longer able to recover as much as before in case of being injured through the carrier's negligence, they are entitled to moderate compensation in all cases of injury (Art. 17), unless the carrier affirmatively proves that all necessary measures were taken to avoid the damage or that it was impossible to take such measures (Art. 20).

In *Matter of Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514, the New York Court of Appeals, in upholding the New York Workmen's Compensation Act, said (at pp. 526-527):

> "A point was made on oral argument that the act was unconstitutional for depriving an employee injured by negligence imputable to the employer of a right of action for the wrong. * * * It is not accurate to say that the employee is deprived of all remedy for a wrongful injury. He is given a remedy. To be sure, the compensation or recovery is limited, and that in a sense may possibly constitute a taking; but if so, it is his contribution to an insurance scheme designed for his benefit, and may be justified on precisely the same grounds as the contribution exacted of the employer has been. When he enters into the contract of employment, he is now assured of a definite compensation for an accidental injury occurring with or without fault inputable to the employer and is afforded a remedy, which is prompt, certain and inexpensive. *In return for those benefits he is required to give up the doubtful privilege of having a jury assess his damages, a considerable part of which, if recovered at all after long delay, must go to pay expenses and lawyers' fees.*" (Italics ours.)

In *Second Employers' Liability Cases*, 223 U. S. 1, the Federal Employers' Liability Act was attacked as unconstitutional because, *inter alia*, of the abrogation of the fellow-servant rule and the restriction of the defenses of contributory negligence and assumption of risk. This Court said (at p. 50):

> "Of the objection to these changes it is enough to observe:
>
> First. 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which

> have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will * * * of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.' *Munn* v. *Illinois*, 94 U. S. 113, 134; *Martin* v. *Pittsburgh & Lake Erie R. R. Co.*, 203 U. S. 284, 294; *The Lottawanna*, 21 Wall. 558, 577; *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 218 U. S. 406, 417."

In like manner, passengers of a common carrier and their dependents have "no property, no vested interest" permitting them to recover from a carrier whatever damages they may suffer in an accident. The Congress, in enacting the Employers' Liability Act, modified the right of action of railroad employees and their dependents against their employers. Similarly, in adhering to the Warsaw Convention, the United States has exercised its treaty-making power to modify the right of action of airline passengers and their dependents in international transportation. The result in both cases is that certain questions which previously were determined by jury trial are no longer so determined because the rights involving such questions no longer exist.

Many jurisdictions have by statute limited the amount of recovery in wrongful death actions leaving to the jury only the question of fixing damages within the limitation. The validity and constitutionality of these limitation provisions have been upheld and it has been further decided that these limitations will be enforced even in a State whose local statute has no limitation. *Atchison, T. & S. F. R. R. Co.* v. *Nichols*, 264 U. S. 348, 44 S. Ct. 353, 68 L. Ed. 270.

POINT V.

Plaintiffs' claims of ambiguity and uncertainty in the provisions of the Warsaw Convention are without foundation and irrelevant.

Plaintiffs argue, in Point IV of their brief, that the liability and limitation provisions of the Convention are so general, vaguely broad, ambiguous and uncertain as to render them void and unenforceable.

As demonstrated in Point I above, plaintiffs' claims in this regard are disposed of by the decisions in the *Wyman, Garcia, Indemnity Insurance Co.* and *Ross* cases, *supra,* upholding the validity of the Convention. Moreover they are both unsupported and irrelevant. For example, plaintiffs claim ambiguity as to whether the Convention applies to acts of the carrier's employees. Article 17 imposes liability without restriction for accidents occurring on board the aircraft. Article 22 limits the carrier's liability for each passenger to $8,291.87. Article 25 provides that this limitation shall not apply if the damage is caused by his wilful misconduct *or that of any of his agents acting within the scope of his employment.* Can anyone entertain a serious doubt in the face of these provisions that the Convention imposes liability upon the carrier for acts of its employees and limits such liability to the amount stated?

The only authorities which plaintiffs cite on this point are cases holding that provisions of *contracts* limiting the liability of carriers are to be construed strictly against the carrier. They cite no cases holding that a statutory or treaty limitation is to be construed in the same manner. In any event, the construction of a contract strictly against the carrier is a far cry from holding the Convention invalid and of no effect.

Conclusion.

The Petition Should Be Denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1949

No. 602

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 602

MARY ELIZABETH LEE, MARY ELIZABETH (BETTY) LEE and WILLIAM CLAIR LEE,

Petitioners,

vs.

PAN AMERICAN AIRWAYS, INC.,

Respondent.

PETITIONERS' REPLY BRIEF

POINT I

The Bombolis case (241 U. S. 211) does not sustain Respondent's contention that the State Courts cannot determine whether Subdivision (1) of Article 22 of the Warsaw Convention infringes the Seventh Amendment of the Federal Constitution.

The *Bombolis* case, cited and quoted at p. 12 in Respondent's Brief, and the various other cases cited by Respondent, enunciate the general rule that the Seventh Amendment does not regulate or limit the action of the *State Legislature* or the *State* courts as regards *State* Legislative and *State* judicial practice and procedure in the enforcement of rights to jury trials. (For explanatory comment upon this rule, see *Vallavonti v. Armour & Co.*, 264 Mass. 337, 342, 162 N. E. 689, 690.) The case at bar, however, involving as it does a question

of unconstitutionality addressed exclusively to *Federal* legislative and executive action, is clearly distinguishable from those cases which are cited by defendant.

Plaintiffs' position is in accord with the principle enunciated in the *McElvaine* case (142 U. S. 155, 158), the *Newcomb* case (18 N. Y. S. 16, 17, 42 St. Rep. 442, 443), and various other similar cases cited at p. 12 of Respondent's Brief. (*Fox v. Ohio*, 5 How. (46 U. S.) 410, 434; *Jackson, etc. v. Wood*, 2 Cowen's Reps. (N. Y.) 819, 820-821, where the New York Supreme Court learnedly discusses the historical background of the first ten amendments, including the Seventh Amendment.) This principle is that the first ten amendments operate only on the various branches of our Federal Government—legislative, executive and judicial—and do not limit the powers of the States or any State agencies under State laws. State Courts have always been free to decide questions of unconstitutionality concerning *federal* laws under any of such amendments.

As it happens, percedents exist for the proposition that State courts have judicial power to determine and pass upon questions of unconstitutionality under the Seventh Amendment regarding *Federal* legislation involved in an action before such State court. (See authorities at p. 35 of Petitioners' Main Brief.

POINT II

None of the cases cited by Respondent supports its argument that the instant action is "not a suit at common law within the meaning of the Seventh Amendment".

The Simmons Case

(Cited at p. 15 of Respondent's Brief)

The *Simmons* case is *sui generis* and, therefore, clearly distinguishable from the case at bar on the facts and the law. There

plaintiff sued for the value of certain real estate taken by the United States Government. Plaintiff's claim stemmed from a Federal Statute expressly permitting plaintiff to sue the Government of the United States in the United States Court of Claims. One of the express conditions of such statute was that the proceedings be without a jury. Such a claim patently was without basis in, or similar to, actions in the category of "suits at law" or "suits peculiarly legal in nature" triable by jury according to the mode of proceedings of courts of law. It was rather in the class of suits known as "statutory condemnation proceedings", to which, traditionally, the Seventh Amendment has no application. (*U. S. v. Kennesaw, etc.*, 99 Fed. (2d) 830, 834 (C. C. A. 8th, 1938).)

The 243.22 Acres Case and the Welch Case

(Cited at p. 17 of Respondent's Brief)

These, like the *Simmons* case, involved condemnation proceedings and are not, therefore, applicable.

The Dimick Case

(Cited at p. 16 of Respondent's Brief)

The *Dimick* case is in no way contrary to the proposition contended for by petitioners. That case is even cited in the *Diederich* case (vide p. 34 of petitioners' main brief), which *applies the protection of the Seventh Amendment to statutory actions for wrongful death.* Recognizing that our "common law is not immutable, but flexible", the Court in the *Dimick* case emphasizes the principle that (p. 487) "To effectuate any change in these rules [when embodied in a constitutional provision] is not to deal with common law *qua* common law, *but to alter the Constitution*" (Emphasis and bracketed insertion supplied). In consonance with that very principle, petitioners maintain that Subdivision (1) of Article 22 of the Warsaw

Convention infringes not only their common law rights to trial by jury, but it is violative of their rights to trial by jury as *preserved in the Seventh Amendment of our Federal Constitution*, which may not thus be altered or invaded.

The other cases cited by Respondent are clearly distinguishable from the situation at bar by the salient factual and legal features presented at pp. 33-35 of petitioners' main brief.

POINT III

Workmen's Compensation Laws of various states and cases pertaining thereto are wholly inapplicable as juridical analogues in the determination of the instant question of unconstitutionality under the Seventh Amendment.

[N. B. Point IV at pp. 22-24 in Respondent's brief is predicated upon Workmen's Compensation Laws of various states and several cases thereunder. In essence, Respondent appeals to the analogies of "juryless" proceedings under such Workmen's Compensation Laws in defense of the arbitrary limitation of tortious liability of air carriers under the Warsaw Convention.]

To begin with, it must be recognized that the Workmen's Compensation Acts of various states are *State legislative acts*. As such they, as well as all court or administrative proceedings thereunder, are not controlled, limited, or in any way affected by the Seventh Amendment. (See the *McElvaine* case, the *Newcomb* case, and various other cases cited at p. 2, *supra*, of this reply brief.) But, by contrast, *all legislative and executive acts*, including treaties or conventions *of our Federal Government*, are subject to the limitations of the Seventh Amendment. (See discussion and authorities at pp. 30-32,

35-36 of petitioners' main brief and pp. 1-2, supra.) Palpably, subdivision (1) of Article 22 of the Warsaw Convention is the creature of the action of both *the legislative and executive branches of our Federal Government.*

Secondly, it should be noted that before the Workmen's Compensation Act (Chap. 67 of Consolidated Laws, Law of N. Y. of 1914, Ch. 41, 64 McKinney's Cons. L. of New York Annot. 2, § 1 *et seq.*) became law, for instance, in the State of New York, it became necessary to amend very specifically the Constitution of the State of New York.

[N. B. In *Ives v. So. Buffalo Ry.*, 201 N. Y. 271, 272-320 (1911), the Court of Appeals declared the original Workmen's Compensation Act (Art. 114 (a) of Labor Law, Ch. 674 of Laws of 1910) unconstitutional. But after the N. Y. Constitution was specifically amended by adding § 18 (formerly § 19) to Art. I thereof (2 McKinney's Cons. Laws of N. Y. Ann. 100) this Court upheld the constitutionality (under the Fourteenth Amendment of our Federal Constittuion) of a subsequent Compensation Act of the N. Y. Legislature as a proper exercise of state police power. (*N. Y. Cent. R. Co. v. White*, 243 U. S. 188, 195-196).]

Besides, Workmen's Compensation Laws were designed to govern and fix the rights of those strictly in the relationship of employee and employer in certain hazardous industries. (*N. Y. C. R. Co. v. White*, 243 U. S. 188, 202-204; *Jensen v. Southern Pac. Co.*, 215 N. Y. 515, 519, reversed in part and on other grounds in 244 U. S. 205; *Employers Mutual L. Ins. Co. v. Refined Syrups, etc.*, 184 Misc. 941, 944 (1945), aff'd in 269 A. D. 931 (Case No. 8, First Dept.). They were not meant to regulate or in any way affect general rights to damages as between either the employee or the employer *and third parties. Emp. Mutual L. Ins. Co. v. Refined Syrups, etc.*, 184 Misc. 941, 944 (1945), affirmed in 269 A. D. 931 (Case No. 8, First Dept.).

Cf. Article 1, § 16 of Constitution of New York (2 McKinney's Consolidated Laws of New York Ann. 497), which provides that the damages recoverable in actions for wrongful death shall not be subject to any statutory limitations.

Moreover, in their essence Workmen's Compensation Laws substitute a completely *new right and remedy* for an extremely doubtful pre-existing common law right and remedy theoretically available to employees in hazardous employments. (For juridical and sociological rationale underlying Workmen's Compensation Laws, see *N. Y. Cent. R. Co. v. White*, 243 U. S. 188, 202-204.) They abolish *entirely* common law principles of negligence and common law defenses peculiarly obtaining as between employee and employer. (*Jensen v. S. Pac. Co.*, 215 N. Y. 514, 519, 526-528, reversed in part and on other grounds in 244 U. S. 205; *N. Y. Cent. R. Co. v. White*, 243 U. S. 188, 202-204.) They establish in lieu of such common law principles the doctrine of absolute liability—*i. e.*, liability wholly regardless of the existence of fault or negligence and contributory negligence, with a concrete compulsory plan of insurance coverage for the benefit of employees.

[N. B. For historical background of doctrine of absolute liability, see Restatement of the Law of Torts, Ch. 40, Introd. Note, p. 221; Pollack on Torts (14th Ed.) p. 11; see also the *Jensen* case and the *N. Y. Cent. R. Co.* case above. As part of the amendment of the N. Y. Constitution (Art. 1, § 18, 2 McKinney's Cons. Laws of N .Y. Ann. 500), the doctrine of absolute liability and the insurance formula are expressly made the basis of the Workmen's Compensation Law of New York.]

Unlike the Workmen's Compensation Acts, the Warsaw Convention *does not substitute* a completely new substantive right and remedy for any existing common law right and remedy. This was even recognized by Mr. Justice Schreiber in the *Wyman* case, where he said (181 Misc. 963, 966):

> " * * * No new substantive rights were created by the Warsaw Convention * * *."

Unlike the Workmen's Compensation Acts, the liability provisions (Arts. 17, 20-22, and 25, 49 Stats. at Large, 3000, 3018-3020) of the Warsaw Convention *are predicated upon the doctrine of negligence or fault*, and not upon the principle of absolute liability. And, unlike the Workmen's Compensation Acts, the Warsaw Convention *does not embody any compulsory insurance coverage for the benefit of passengers and their families!*

Knauth, in contrasting the "Uniform State Aeronautical Liability Act adopted at Cleveland", with the Warsaw Convention, in 9 Air Law Rev. 352, 354, emphasizes that the Warsaw Convention rests essentially upon the doctrine of *fault—i. e. negligence*, as opposed to that of absolute liability, *without provision for compulsory insurance protection to injured parties.*

To same effect: Cha's article "The Air Carrier's Liability to Passengers in International Law" (1936), 7 Air Law Rev. 25, 34-35, where, in passing, it is significantly pointed out that Article 20, par. 1, of the Warsaw Convention, "may do away with the objective liability contemplated in Article 17. The defendant carrier can always plead that he or his agents took necessary measures to prevent injury to the passenger. The term 'necessary measures' is rather vague. The measures necessary for the carrier to take may vary with circumstances. The carrier can likewise plead that it was impossible to prevent the injury."

And in this connection it should be noted that under Article 21 of the Warsaw Convention *contributory negligence* of the person injured *may entirely exonerate the carrier from liability.*

In view of the foregoing legal considerations, the conclusion is ineluctable that Workmen's Compensation Laws of various states and cases pertaining thereto, are wholly inapplicable as juridical analogues in the determination of the instant question of unconstitutionality under the Seventh Amendment.

POINT IV

The Federal Employer's Liability Act and cases thereunder uphold the common law principle of unlimited liability for torts and are, therefore, consonant with the Seventh Amendment.

An endeavor is made by Respondant to find some refuge in the Federal Employer's Liability Act (pp. 22-25 of Respondent's brief) and the Second Employer's Liability Cases thereunder.

However, as stated in *Sibert v. Litchfield, etc.*, 159 S. W. (2d) 612, 619 (1941), unreported officially:

> "Confessedly there is no yardstick by which to accurately measure the size of a verdict which this Court will approve in death cases arising under the Federal Employer's Liability Act."

Accord:

Louisville & N. R. Co. v. Stephens, 298 Ky. 328, 343, 182 S. W. (2d) 447 (1944);

Chesapeake & Ohio Ry. v. Kelly, etc., 241 U. S. 485, 489, 491 (1916);

Haidacker v. Central R. R. Co. of N. J., 52 Fed. Supp. 713, 714-715 (E. D. N. Y. 1943);

Cunningham v. Pennsylvania R. R. Co., 55 Fed. Supp. 1012-1013 (E. D. N. Y. 1944);

Tumulo v. Reading Co., 52 Fed. Supp. 956, 957 (D. N. J. 1943).

In *Second Employer's Liability* Cases, 223 U. S. 1 (cited at p. 24 of Respondent's brief), the principal question concerned the power of Congress to regulate the relations between carriers

and their employees in interstate commerce (p. 46). The objection to the unconstitutionality of the Employer's Liability Act was made *not under the Seventh Amendment*, but rather under the Fifth Amendment. No point was there presented or considered as to the substantive right to trial by jury on issues of damages. The excerpt as quoted from that case by defendant has particular reference only to *common law rules* of liability and defenses peculiar to negligence actions as between employees and employers, such as the fellow servant rule, the assumption of risk rule, etcetera. In this connection, it is significant that the Court stressed the consideration that (p. 50):

> "'* * * the law itself as a rule of conduct may be changed at the will * * * of the Legislature, *unless prevented by constitutional limitations.*'" (Emphasis ours.)

In the case at bar one of the points presented is precisely that the legislative act of the United States Senate and the executive act of the President, as reflected in the limited liability provisions of the Warsaw Convention, are "*prevented by constitutional limitations*".

POINT V

The Warsaw Convention does not substitute admiralty doctrines of liability exemption and limitation for the general principle of unlimited *tortious* liability of common carriers.

By way of *gratis dictum*, the Appellate Division in the *Garcia* case (269 A. D. 287, 293) said:

> "* * * these provisions in effect substitute the admiralty doctrine of exemption from liability conditioned on lack of fault as statutory limitation of liability for the theory of liability of common carrier."

[N. B. Presumably, the admiralty liability exemption and limitation doctrines referred to are those in the Federal Fire Statute (R. S. § 4282, Act of March 3, 1851, c. 43, 46 U. S. C. A. 104, § 182) and its companion Federal Liability Limitation Statutes (R. S. § 4283 and 23 Stat. 57, 46 U. S. C. A. 109, 160, § 183, § 189).]

This statement is erroneous. It is without support in the basic aviational regulatory purposes of the Warsaw Convention or in any judicial precedent. Its source is merely the bald conclusion of a writer in 22 Corn. L. Q. 561, cited at page 293 in the *Garcia* case, without any demonstration of its validity. It is directly contradicted by Cha in 7 Air Law Rev. 25, 34-35 (see p. 7, *supra*) and by Knauth in 9 Air Law Rev. 352, 354 (see p. 7, *supra*).

In our American jurisprudence it is definitely recognized that the liability exemption and limitation doctrines and analogies peculiar to admiralty have no application to torts of the air. From early common law times up to our modern era, the land and the air have been regarded, in legal contemplation, as inseparable. (50 C. J. 751-752. The source of this juridical concept is the maxim—"*Cujus est solum ejus est usque ad coelum*—He who possesses land possesses also that which is above it." (17 C. J. 391; 2 Black. Comm. 18; 3 Kent's Comm. (14th Ed.) 401).) Accordingly, the legal principles and rules reigning over the domain of "land" are considered as supreme over its incidental natural atmospheric element—the air. This is in conformity with the maxim—"*Cujus juris* (*i. e., jurisdictionis*) *est principale ejusdem juris erit accessorium*—an accessory matter is subject to the same jurisdiction as its principal" (17 C. J. 391).

Thus, Section 6 of the Uniform Aeronautics Act, as approved by the National Conference of Commissioners on Uniform State Laws in 1922, 11 Uniform Laws Ann. 163, expressly provides that the liability of the owner of aircraft to passen-

gers for damages occasioned "in the air shall be determined by the rules of law applicable to torts on land".

Thus, Section 177 (a), the Federal Air Commerce Act (44 Stat. 572, 49 U. S. C. A., 1949 Cum. Supp. 123, § 177, subd. (a)) of 1926 expressly states that "*the navigation and shipping laws of the United States * * * shall not be construed to apply to seaplanes or other aircraft * * *.*" (Emphasis supplied.)

Thus, as stated in 6 Am . Jur. 33, § 56:

> "The principles which govern carriers by other means, such as by railroad or motor bus, govern carriers by aircraft."

See also:

§ 787 (a) of the Federal Civil Aeronautics Act of 1938 (52 Stat. 977, 49 U. S. C. A., 1949 Cum. Supp. 331, § 787, subd. (a));

Re: Reinhardt v. Newport S. F. Corp., 232 N. Y. 115, 118, (opinion by Cardozo, J.);

Dollins v. Pan-American Grace Airways, Inc., 27 Fed. Supp. 487, 488-489 (S. D. N. Y. 1939);

Noakes v. Imperial Airways Ltd. et al., 29 Fed. Supp. 412-414 (S. D. N. Y., 1939);

Bogert in his article "Problems In Aviation Law", 6 Corn. Law Q. 271, 302.

The foregoing considerations are also dispositive of Judge Rifkind's inaccurate analogizing reference to the Maritime Federal Fire and Liability Limitation Statute in the *Indemnity Insurance* case (58 Fed. Supp. 338, 340).

Moreover, the assumption that the Warsaw Convention embodies the admiralty doctrines of liability exemption and limitation is untenable on other serious grounds. The implication

of such assumption is that the Senate and the President could and did extend, through their act of adherence to such Warsaw Convention, the Federal Admiralty powers so as to convert *aviation* cases under such Warsaw Convention into "admiralty cases", or "claims in the nature of admiralty". Restrictions, however, in Article 3, § 2, cl. 3, and the Seventh Amendment, preclude the exercise of such power by any branch of our Federal government.

In *U. S. v. One Hundred and Thirty Barrels of Whisky*, 27 Fed. Cases (Case No. 15938), 281-282 (S. D. Ohio), the Federal Court expressly held that *Congress has no power to deprive any litigant of his rights under the Seventh Amendment* "by declaring that a case *not* properly within the jurisdiction of the admiralty, shall be treated and dealt with according to the known principles of courts of admiralty".

To same effect:

Bogert in 6 Corn Law Q. 271, 305;

The Sarah, 8 Wheat. (21 U. S.) 391, 394-395, (Marshall, Ch. J.) as reaffirmed in *U. S. v. 422 Casks, etc.*, 1 Pet. (26 U. S.) 547, 548;

1 C. J. 1252, § 19;

Cf. 31 Am. Jur. 556-557 (§ 7);

16 R. C. L. 197, § 15.

POINT VI

The decisions of the Special Term and the Appellate Division of the New York State Supreme Court necessarily involve a determination of one or more of the Federal questions at bar.

Respondent's statement under Point III of its brief, that the decisions of such State Courts may have been on a state ground

or on a federal ground, is erroneous. The so-called fourth defense (R62-68) *does not plead a general contract* between Respondent and decedent which is wholly independent of, or unrelated to, the Warsaw Convention. On the contrary, it expressly incorporates the liability limitation provisions of the Warsaw Convention. Thus, it states, inter alia, (R68):

> " • • • in accordance with the aforesaid agreement the rights of the parties herein were and are governed by and subject to the rules relating to the liability established by the said Warsaw Convention • • • and defendant claims a limitation of liability in accordance with the rules relating to liability for debt established by said Convention • • •."

Since the particular segment of the Warsaw Convention which purports to limit Respondent's *tortious liability for damages*, is inextricably interwoven with such contract (R. 62-68), the unconstitutionality of such segment of the Warsaw Convention under the Seventh Amendment permeates such contract itself, invalidating the liability limitation therein *as directly stemming from the Warsaw Convention*. This point of petitioners is grounded in authoritative pronouncements by this Court and other authorities (see pp. 37-38 of Petitioners' main brief). It presents a federal question exclusively.

Also fallacious is Respondent's argument that "a second state ground independent of any federal question" exists in the question of whether decedent, in such transportation contract, waived his rights under the Seventh Amendment. This question, concerning as it does one of the fundamental guarantees in the Federal Constitution in relation to the legal effect of subdivision (1) of Article 22 of the Warsaw Convention as inextricably interwoven with such transportation contract, is a federal not a state question. It unavoidably involves a determination of the federal question of the legal effect of the constitutionality under the Seventh Amendment of subdivision

(1) of Article 22 of the Warsaw Convention *on the identical liability limitation provisos of such Warsaw Convention as expressly incorporated in such transportation contract.* (See Point II of Petitioners' main brief, pp. 37-38.)

However, assuming arguendo, without conceding, that such question concerns a state ground exclusively, it will not operate, in the situation at bar, to preclude this Court from taking jurisdiction to review the other federal questions. As demonstrated under Point III of Petitioner's main brief (pp. 39-40), Respondent's contention of waiver of the rights under the Seventh Amendment is absolutely incorrect in law. Accordingly, as stated in *Johnson v. Risk*, 137 U. S. 300, 307:

> "Where there is a federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of two grounds the judgment was based, then *if the independent ground was not a good and valid one*, sufficient of itself to sustain the judgment, *this Court will take jurisdiction of the case*, because when put to inference as to what points the State Court decided *we ought not to assume that it proceeded on grounds clearly untenable.*" (Emphasis supplied.)

Accord:

Klinger v. Missouri, 13 Wall (80 U. S.) 257, 263;

Maguire v. Tyler, 8 Wall (75 U. S.) 650, 665.

Furthermore, no matter which or how many of the closely allied first seven federal questions concerning the application of the Seventh Amendment in the case at bar may have been decided, the orders and the judgments herein could not have been made unless the eighth question* was also determined by the Special Term and the Appellate Division. That question challenges the validity of subdivision (1) of Article 22 of the

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*See pp. 7-8 of Petitioners' main brief.

Warsaw Convention per se and as expressly incorporated in the transportation contract (R. 62-68), as a matter of correct legal construction. (See Point IV of Petitioners' main brief, pp. 40-55.) That question is exclusively a federal one, and is *entirely independent* of any of the first seven questions.

CONCLUSION

A

Analysis of Basis of Recommendations, by the Departments of Commerce and State, of United States Adherence to the Warsaw Convention, with Specific Reference to the Question of the Restriction of the *Tortious* Liability of Air Carriers.

The recommendations of United States adherence to the Warsaw Convention as contained in the letter (R. 75-76) dated November 28, 1933, from the Department of Commerce to the Department of State, and in the report (R. 76-81) of the Department of State based thereon, do not appear to be predicated upon any consideration or study whatever of the serious specific questions herein presented concerning the invalidity of Subdivision (1) of Article 22 of the Warsaw Convention.

On the contrary, so far as concerns the provisos purportedly limiting the air carriers' liability for *tortious* conduct, they are founded on loose superficial generalities and concepts clearly in contravention of the Seventh Amendment of the United State Constitution and fundamental principles of law and justice governing the correct construction of the Warsaw Convention. Indeed, their very language reveals that they were influenced primarily and predominantly by considerations favoring the economic advantages and interests of the American air transport operators. Thus, the Department of Commerce, in its letter to the Department of State, wrote (R. 75):

> " • • • All United States operators conducting international air transport services strongly favor adher-

> ence to the Convention by the United States * * *. The Aeronautical Chamber of Commerce of America, the trade association organization representing 90% of those operating internationally, strongly favors participation in the Convention. No airline operated at the present time has indicated opposition to adherence to the Convention by the United States."

Thus, the Department of State, in its report, expressed the following (R. 80):

> "This Convention has been studied by the Department of Commerce ,which advises adherence thereto by the Government of the United States. That Department has expressed the view that the provisions of the Convention are fair and *afford protection to the air transport operator* as well as to passengers and shippers, and that *if the United States fails to become a party to the Convention American air transport lines operating on an international basis will be at a disadvantage* while operating in countries that are parties to the Convention." (Emphasis supplied.)

The blanket statement of both the Department of Commerce and the Department of State that "the provisions of the Convention are fair and afford protection * * * to passengers" is sheer illusory flimsiness. It is contradicted by realities in all situations *where*, as in the case at bar, *it can be established by proof that a passenger's injuries and death were caused by the negligence of the carrier* and the resulting damages are considerably in excess of the sum of $8,291.87 as fixed in the Convention. In such cases, passengers and their dependent families gain nothing—indeed, inequitably lose the greater measure of the value of their property rights in damages under the Convention's arbitrary limitations of the carrier's liability.

[N. B. Cf. the established principle of *unlimited* liability *for negligence* of common carriers of the sea in the sphere of maritime or admiralty law. It is highly significant that the Federal Liability Limitation Statutes in admiralty law in no

way affect the right to recover unrestricted damages for injuries or death resulting from *negligence* of vessel owners or operators. *Liverpool, etc. v. Phenix*, 129 U. S. 397, 438, 440; *The Wildomino*, 300 Fed. 5, 8, 10-11 (C. C. A. 3rd, 1924), cert. dismissed in 270 U. S. 641 (Case No. 167); *N. Y. C. Railroad Co. v. Lockwood*, 17 Wall. (84 U. S.) 357, 361; *City of Bangor*, 13 Fed. Supp. 648, 649 (D. Mass. 1936); *The Hockley*, 10 Fed. Supp. 908, 914, 917 (1935). In this connection see 46 U. S. C. A. §§ 491, 762, 764 and 46 U. S. C. A. 1947 Cum. Supp., p. 65, § 183c.]

In view of the inequalities in position between passengers and the powerful corporate air carriers and the fact that the Warsaw Convention was predominantly enacted for the benefit of a distinct class of business adventurers acting as common carriers, the general, vaguely broad, and ambiguous terms of such Warsaw Convention and transportation contract thereunder, must be construed most strongly against such business adventurers and most liberally in favor of the general public (Broom's Legal Maxims [10th Ed. 1939], p. 408; *Stowbridge Canal Co. v. Wheeley*, 2 B. & Ad. 792; *Priestly v. Foulds*, 2 Scott N. R. 205, 228; *Gildart v. Gladstone*, 11 East 675, 685; *Ribble Navig. Co. v. Hargreaves*, 17 C. B. 385, 402.)

B

The Warsaw Convention *does not confer real benefits* on passengers and their families as contrasted with those provided by existing laws.

Contrary to the general assertions in the report of the Department of State (as quoted at pp. 6-7 of Respondent's brief) *no real benefits* are conferred by the Warsaw Convention on passengers or their families as contrasted with those provided by existing laws.

To begin with, under prevailing general law, the general public are entitled to expect nothing less than the "highest degree of carefulness" and diligence (*N. Y. C. R. R. v. Lockwood*, 17 Wall [84 U. S.] 357, 378) from common carriers *for the safety of passengers and the protection of their families.* The rules of the Warsaw Convention will be searched in vain for anything providing a greater measure of security for lives and families than this. Indeed, the arbitrary limitations of the common carrier's tortious liability as prescribed in such Warsaw Convention, *tend to lessen* rather than promote the high degree of care to be exercised by such common carriers and their agents. (See authorities at pp. 53-55 of Petitioners' main brief.)

The presumption of negligence afforded in Article 17 of the Warsaw Convention, probably more frequently than otherwise, would be nothing more than an illusory balloon. For it generally lies in the power of a common carrier to explode it instantly with but a slight pinprick under Article 20 of such Warsaw Convention. That Article rather vaguely provides:

> "(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Besides, under the existing general law in various jurisdictions, including New York, there is already available an identical presumption of negligence in the common law doctrine of *res ipsa loquitur*, which is applicable in aviation negligence cases.

[N. B. In Charlesworth's "The Law of Negligence" (1938 Ed.) it is stated (p. 122): "When negligence is in question the doctrine of *res ipsa loquitur* applies as well to aircraft as to other vehicles." Accord: 6 Am. Jur. 40, § 73; 83 A. L. R. 370-371; *Stall, etc. v. Curtiss Flying Service Inc.*, 1930 U. S. Av. R. 148, 152-153 (N. Y. Sup. Ct. N. Y. Co., unreported

officially) aff'd in 236 A. D. 664 (Case No. 5, 1932); *Braman-Johnson, etc. v. Thompson*, 167 Misc. 167, 171 (1938).]

And irrespective of where the tort of negligence may occur, such presumption being procedural, may be invoked under the *lex fori*. (*Spokane Inland R. R. v. Whitley*, 237 U. S. 487, 495; *Sapone, etc. v. N. Y. C. & H. R. R. R. Co.*, 130 Misc. 755, 756, (N. Y. Sup. Ct., Monroe Co., Rippey, J., 1927); *Kiefer v. Grand Trunk R. Co.*, 12 A. D. 28, 31, aff'd in 153 N. Y. 688; *Murray v. N. Y. O. & W. R. R. Co.*, 242 A. D. 374, 376 (1st Dept., 1934.)

It should not be pre-supposed as suggested in the report of the Department of State (R. 78) that such arbitrary limitation of liability and presumption of negligence will serve to lessen litigation. For, according to experience of realism, so long as it generally lies in the ability of a common carrier to offer some defensive evidence to rebut the presumption of negligence, it may be expected to do so. After all, the basis of the liability of the common carrier, even under the Warsaw Convention, is the principle of *negligence or fault*, as distinguished from the theory of absolute liability (9 Air Law Rev. 352, 354; 7 Air Law Rev. 25, 34-35).

Moreover, the Warsaw Convention nowhere provides for any real benefits for passengers and their families in terms of *compulsory insurance* to be furnished by common air carriers (9 Air Law Rev. 352, 354).

C

The established principle of unlimited liability for *negligence* of common carriers of the sea vis-a-vis the doctrine of unlimited liability for negligence of common carriers of the air advocated by petitioners.

Nor is the purpose of such Warsaw Convention in fostering international air transportation and commerce a justification

for the sacrifice of considerations of public policy and morality, and substantial rights of passengers and their families to recover full compensation for harmful negligence of common air carriers. In admiralty, the design of the Harter Act (27 Stat. 445, 46 U. S. C. A. 188, § 19 *et seq.*) the Federal Fire Statute (46 U. S. C. A. 104, § 182) and the Federal Liability Limitation Statutes (46 U. S. C. A. 109, 160, § 183 as amended, § 189) is "the encouragement of shipbuilding and the employment of ships in commerce" (*The Santa Rosa*, 249 Fed. 160, 161 [N. D. Calif., 1918]). Yet, the principle has long been firmly established, even in admiralty, that in all cases of property damages or personal injuries or death *caused by the negligence or fault* of the vessel owners or operators, the right to recover full compensation is *not* affected by the Federal Liability Limitation Statutes (*Liverpool Steam Co. v. Phenix*, 129 U. S. 397, 438, 440; *The Wildomino*, 300 Fed. 5, 8, 10-11 (C. C. A. 3rd, 1924), cert. dismissed in 270 U. S. 641, (Case No. 167, 1926); *Railroad Co. v. Lockwood*, 17 Wall (84 U. S.) 357, 361; *City of Bangor*, 13 Fed. Supp. 648, 649 (D. Mass., 1936); *The Irving F. Ross*, 8 Fed. [2d] 313-314 (D. Mass., 1923); *The Hockley*, 10 Fed. Supp. 908, 914, 917 (1935); *Hines v. Butler*, 278 Fed. 877, 879-881 (C. C. A. 4th, 1921), cert. den. in 257 U. S. 659, (Case No. 662); *Butler v. Boston & Savannah Steamship Co.*, 130 U. S. 527, 553. In this connection, see 46 U. S. C. A., §§ 491, 762, 764, and 46 U. S. C. A., 1948, Cum. Supp. 67, § 183c, L. 1936). In such cases contractual limitation of liability has been enforced only on the basis of a reduced transportation rate *voluntarily chosen* by the shipper or passenger (*Liverpool Steam Co. v. Phenix, etc.*, 129 U. S. 397, 437-439, 441-442; *The Wildomino*, 300 Fed. 5, 8, 10-11, (C. C. A. 3rd, 1924), cert. dismissed in 270 U. S. 641 Case No. 167, 1926). Palpably, the principle of full liability for the *negligence* of pliers of the sea is recognized to be maintainable in consonance with the furtherance of *safe* international maritime transportation and commerce. By the same

token, essentially the same principle of full liability for the *negligence* of common air carriers would be in accord with the promotion of *secure* international air transportation and commerce. Both the common carrier of the sea and the common carrier of the air, are alike subject to high moral and legal duties to exercise maximum precautions for the protection of passengers and their families. If the responsibility of one is unlimited in cases of his negligence, so should the other be in identical situations.

D

Full liability for checked baggage and goods, as expressly recognized in the Warsaw Convention vis-a-vis full liability for value of God-given precious human life under Seventh Amendment.

As to all checked baggage and goods, the Warsaw Convention itself implements the common law principle of unlimited liability for those who are given an opportunity to demand it and pay "a supplementary sum" therefor.

[N. B. Article 22, Subdivision (2), 49 U. S. Stats. at Large, 3000, 3019. In essence its terms follow such established common law principle as codified in the Federal Interstate Commerce Act of February, 1887, as amended by the Hepburn-Carmack Act of June, 1906, as further amended by the Cummins Acts of 1916 and 1920, 49 U. S. C. A. § 20.11; *Adams Express Co. v. Croninger*, 226 U. S. 491, 509-510; *Hartzberg v. N. Y. C. R. R. Co.*, 181 Misc. 129, 136 (1943) aff'd in 268 A. D. 904-905 (1944, Case No. 10, aff'd in 295 N. Y. 703).]

Certainly, there can be no valid reason why mere goods should be thus accorded full protection within the framework of the Seventh Amendment, and the value of God-given precious human life should be denied the same common law and constitutional privilege. Certainly, the Seventh Amendment

makes no arbitrary discrimination in favor of material possessions as against precious human life. Its aegis covers both.

E

Salient Points

In the light of the applicable legal considerations and authorities, Subdivision (1) of Article 22 of the Warsaw Convention is void and unenforceable because it infringes such Seventh Amendment. Such unconstitutionality fatally infects and renders unenforceable the liability limitation provisos of the transportation contract at bar (see discussion of these points and supporting authorities at pp. 37-38 of petitioners' main brief).

Moreover, as previously demonstrated, the liability limitation provisions of such Warsaw Convention and the transportation contract thereunder are void and unenforceable upon another serious ground. They are fatally general, vaguely broad, and infected with ambiguity and uncertainty as to the causes and the kinds of liability of Respondent, and as to the persons affected thereby (see discussion of this point and supporting authorities at pp. 40-55 of petitioners' main brief).

Accordingly, a writ of certiorari should be granted as prayed for in the petition.

Respectfully submitted,

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